



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

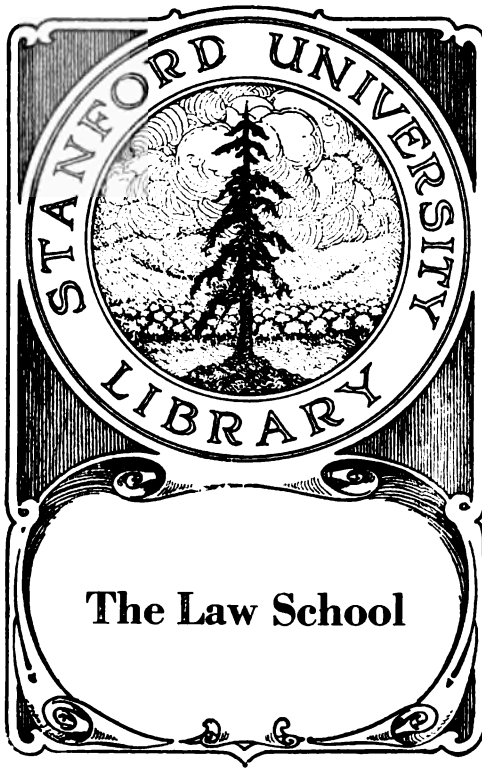
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>















**OFFICIAL OPINIONS**  
**OF**  
**THE ATTORNEYS-GENERAL**  
**OF**  
**THE UNITED STATES,**  
**ADVISING THE**  
**PRESIDENT AND HEADS OF DEPARTMENTS**  
**IN RELATION TO THEIR OFFICIAL DUTIES,**  
**AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN**  
**GOVERNMENTS AND WITH INDIAN TRIBES, AND**  
**THE PUBLIC LAWS OF THE COUNTRY.**

**EDITED BY**  
**JOHN L. LOTT**  
**(OF THE BAR OF OHIO)**  
**AND**  
**JAMES A. FINCH**  
**(OF THE BAR OF THE DISTRICT OF COLUMBIA).**

---

**VOLUME XXIV.**

**WASHINGTON:**  
**GOVERNMENT PRINTING OFFICE.**  
**1903.**

**340255**

VIA RAIL 350-017

---

VOLUME XXIV.

CONTAINING

THE OPINIONS OF ATTORNEY-GENERAL

HON. PHILANDER C. KNOX, of Pennsylvania.

ALSO CONTAINING OPINIONS BY SOLICITOR-GENERAL

HON. JOHN K. RICHARDS, of Ohio,

AND

ACTING ATTORNEYS-GENERAL

HON. HENRY M. HOYT,

HON. JAMES M. BECK,

HON. WILLIAM A. DAY.

ALSO CONTAINING CITATIONS OF ACTS OF CONGRESS, THE REVISED  
STATUTES, TREATIES AND CONVENTIONS, OPINIONS OF ATTORNEYS-  
GENERAL, AN INDEX OF SUBJECTS, AND AN INDEX DIGEST.



# ACTS AND RESOLUTIONS OF CONGRESS CITED OR REFERRED TO IN THIS VOLUME.

[Where an act or resolution is cited or referred to twice in the same opinion, only the first citation or reference is indicated.]

	Page.
1793, February 18, sec. 32 (1 Stat., 316).....	599
1795, February 28, sec. 1 (1 Stat., 424).....	654
1808, April 21 (2 Stat., 484) .....	560
1828, May 24 (4 Stat., 312).....	599
1836, June 14 (5 Stat., 133).....	668
1841, September 11, sec. 3 (5 Stat., 468).....	619
1847, March, 3, sec. 17 (9 Stat., 186).....	128
1862, July 12 (12 Stat., 623).....	581
1863, March 3, sec. 6 (12 Stat., 751).....	130, 581
1865, March 3 (13 Stat., 571).....	64
1866, July 24 (14 Stat., 221).....	604
1867, March 2 (14 Stat., 434).....	75
1868, July 23 (15 Stat., 168).....	648
1872, March 18 (17 Stat., 41).....	613
1874, March 4 (18 Stat., 19).....	646
1874, June 11, sec. 3 (18 Stat., 70).....	52
1874, June 22, sec. 2 (18 Stat., 186).....	623
1874, June 22, secs. 4 and 6 (18 Stat., 186).....	61
1874, June 22, secs. 17 and 18 (18 Stat., 189).....	587, 590
1874, June 22, sec. 21 (18 Stat., 190).....	36
1875, February 18 (18 Stat., 318).....	613
1875, March 3, sec. 1 (18 Stat., 469).....	36
1876, August 15 (19 Stat., 169).....	65
1877, March 3, sec. 5 (19 Stat., 335).....	540
1878, May 17, sec. 3 (20 Stat., 62).....	542
1880, June 15 (21 Stat., 226).....	622
1881, January 31 (21 Stat., 604).....	117
1881, March 3 (21 Stat., 521).....	668
1882, May 6, secs. 1, 3, and 4 (22 Stat., 59).....	114, 561
1882, August 3, sec. 1 (22 Stat. 214).....	591
1882 August 3, (22 Stat., 214).....	87
1883, January 16, sec. 7 (22 Stat., 406).....	65
1883, January 16, sec. 11 (22 Stat., 406).....	135
1883, March 3, sec. 2 (22 Stat., 485).....	548



	Page.
1884, June 26, sec. 14 (23 Stat., 57) .....	123, 597
1884, June 26, sec. 20 (23 Stat., 58) .....	112
1884, July 5, secs. 3 and 4 (23 Stat., 115) .....	562
1885, February 26 (23 Stat., 332) .....	102, 112
1886, June 19, sec. 11 (24 Stat., 81) .....	123, 597
1888, September 13, secs. 6 and 7 (25 Stat., 477) .....	92, 637
1888, September 13, sec. 12 (25 Stat., 478) .....	562
1889, February 12 (25 Stat., 661) .....	107
1890, March 5 (26 Stat., 17) .....	646
1890, June 10, secs. 7 and 13 (26 Stat., 134) .....	584
1890, June 10, sec. 9 (26 Stat., 135) .....	2
1890, June 10, sec. 12 (26 Stat., 136) .....	13
1890, June 10, sec. 15 (26 Stat., 138) .....	31, 37
1890, June 10, sec. 23 (26 Stat., 140) .....	59
1890, June 27 (26 Stat., 182) .....	556
1890, July 11 (26 Stat., 242) .....	668
1890, September 19 (26 Stat., 465) .....	564
1890, October 1, sec. 24 (26 Stat., 617) .....	47
1890, October 1, sec. 25 (26 Stat., 617) .....	54
1891, February 9 (26 Stat., 737) .....	128, 580
1891, March 3 (26 Stat., 1035) .....	531
1892, March 29 (27 Stat., 12) .....	128, 580
1892, May 5, sec. 6 (27 Stat., 25) .....	132
1893, February 15, secs. 3 and 5 (27 Stat., 449) .....	673
1894, July 31, sec. 2 (28 Stat., 205) .....	14
1894, July 31, sec. 8 (28 Stat., 208) .....	85, 700
1894, August 18 (28 Stat., 391) .....	591, 622
1894, August 27, par. 182½ (28 Stat., 521) .....	34
1894, August 27, sec. 21 (28 Stat., 551) .....	47
1894, August 27, sec. 26 (28 Stat., 552) .....	588
1895, January 12, secs. 54 and 73 (28 Stat., 608) .....	663
1896, May 28 (29 Stat., 188) .....	139
1896, May 28, secs. 19 and 21 (29 Stat., 184) .....	686
1897, March 2 (29 Stat., 604) .....	635
1897, July 24, par. 181, 182 (30 Stat., 166) .....	45, 569
1897, July 24, par. 415 (30 Stat., 190) .....	6
1897, July 24, par. 483 (30 Stat., 195) .....	55, 612
1897, July 24, par. 701 (30 Stat., 203) .....	28
1897, July 24, par. 703 (30 Stat., 203) .....	40
1897, July 24, sec. 5 (30 Stat., 205) .....	37
1897, July 24, sec. 11 (30 Stat., 207) .....	551
1897, July 24, sec. 15 (30 Stat., 207) .....	58
1897, July 24, secs. 16, 18 (30 Stat., 208) .....	589
1897, July 24, sec. 29 (30 Stat., 210) .....	46, 569
1897, July 24, sec. 30 (30 Stat., 211) .....	54, 575
1897, July 24, sec. 32 (30 Stat., 211) .....	2, 537
1897, December 29, sec. 9 (30 Stat., 226) .....	577

	Page
1898, June 13, Sched. A (30 Stat., 459).....	44
1898, June 13 (30 Stat., 464).....	99
1898, June 28, sec. 21 (30 Stat., 495).....	689
1899, March 3 (30 Stat., 1008).....	75
1899, March 3, sec. 2 (30 Stat., 1149).....	595
1899, March 3, sec. 4 (30 Stat., 1014).....	79
1899, March 3, sec. 11 (30 Stat., 1007).....	709
1900, April 12, sec. 3 (31 Stat., 77).....	122, 612
1900, April 12 (31 Stat., 77).....	56
1900, April 12, sec. 4 (31 Stat., 78).....	86, 123, 621
1900, April 12, secs. 7, 9, 18 (31 Stat., 79).....	41
1900, April 30, sec. 91 (31 Stat., 159).....	601
1900, April 30, sec. 98 (31 Stat., 161).....	7
1901, February 15 (31 Stat., 790).....	604
1901, March 1, sec. 26 (31 Stat., 869).....	626
1901, March 2 (31 Stat., 910).....	537
1901, March 3 (31 Stat., 1099).....	580
1901, March 3 (31 Stat., 1162).....	702
1901, March 3, sec. 8 (31 Stat., 1449).....	667
1902, March 6, secs. 4, 5, 10 (32 Stat., 51).....	65, 71
1902, March 6 (32 Stat., 51).....	702
1902, March 22 (32 Stat., 78).....	52
1902, April 28 (32 Stat., 152).....	616
1902, April 28, sec. 3 (32 Stat., 171).....	81, 95, 103, 544
1902, April 29, sec. 1 (32 Stat., 176).....	638
1902, April 29, sec. 2 (32 Stat., 176).....	562
1902, April 29 (32 Stat., 176).....	544
1902, May 13 (32 Stat., 740).....	663
1902, June 13 (32 Stat., 342).....	594
1902, June 13, sec. 14 (32 Stat., 376).....	594
1902, June 27, sec. 3 (32 Stat., 406).....	98
1902, June 28 (32 Stat., 456).....	701
1902, June 30 (32 Stat., 571).....	85
1902, July 1 (32 Stat., 630).....	106, 125, 675, 696
1902, July 1 (32 Stat., 678).....	663
1902, July 1 (32 Stat., 691).....	121, 535, 550
1902, July 1 (32 Stat., 706).....	645
1902, July 1, par. 41 (32 Stat., 651).....	689
1902, July 1 (32 Stat., 750).....	556
1903, February 14 (32 Stat., 825).....	697
1903, February 25 (32 Stat., 896).....	703
1903, March 3 (32 Stat., 994).....	624
1903, March 3 (32 Stat., 1059).....	699
1903, March 3 (32 Stat., 1157).....	675
1903, March 3, sec. 36 (32 Stat., 1221).....	707

# REVISED STATUTES OF THE UNITED STATES CITED IN THIS VOLUME.

[Where a section is cited twice in the same opinion, only the first citation is indicated.]

Section.	Page.	Section.	Page.
161 .....	698	3074 .....	584, 589
177 .....	648	3075-3079 .....	585, 589
249 .....	34	3080 .....	585
355 .....	618	3081 .....	584
412 .....	558	3082 .....	61, 586
667 .....	107	3394 .....	120
681 .....	107	3402 .....	122
875 .....	70	3448 .....	120
1063 .....	545	3642 .....	686
1216 .....	127, 579	3687 .....	622
1219 .....	75	3736 .....	603
1285 .....	129	3739 .....	560
1407 .....	580	3753 .....	681
1603 .....	74	3754 .....	682
1612 .....	580	3894 .....	564
1625-1641 .....	655	3929 .....	564
1642 .....	654	4041 .....	564
1644 .....	656	4071 .....	70
1649 .....	656	4071-4074 .....	71
1650-1652 .....	656	4131 .....	139
1745 .....	674	4347 .....	57
1753 .....	66	4351-4353 .....	27
1754 .....	64	4367 .....	57
1763-1765 .....	14	4406-4407 .....	142
1781 .....	560	4437 .....	142
1782 .....	560	4439-4442 .....	143
1783 .....	559	4445 .....	140
1797 .....	616	4449 .....	137
2544 .....	613	4450 .....	140
2653 .....	613	4452 .....	139
2730 .....	613	4511 .....	113
2774 .....	28	4585 .....	122
2804 .....	588	4803 .....	123
2806 .....	28	4905 .....	71
2811 .....	28	5293 .....	587
2823 .....	28	5294 .....	139
2824 .....	28	5546 .....	549
2865 .....	586		

## TREATIES AND CONVENTIONS REFERRED TO IN THIS VOLUME.

---

	Page.
Choctaw Indians: September 27, 1830 (7 Stat., 335) .....	689
Creek Indians: June 14, 1866 (14 Stat., 785) .....	624
China: December 8, 1894 (28 Stat., 1210) .....	91, 112, 132, 544, 637
Spain: April 11, 1899 (30 Stat., 1758) .....	9, 43

OPINIONS CITED, FOLLOWED, AFFIRMED, DISTINGUISHED, MODIFIED,  
AND OVERRULED.

	Page.
2 Op., 558.....cited .....	131
3 Op., 530.....cited .....	661
3 Op., 691.....cited .....	661
4 Op., 70.....cited .....	131
5 Op., 22.....cited .....	129
5 Op., 58.....cited .....	571
6 Op., 416.....cited .....	571
7 Op., 114.....cited .....	644
8 Op., 102.....cited .....	619
8 Op., 418.....cited .....	620
10 Op., 34.....cited .....	620
10 Op., 52.....cited .....	131
10 Op., 100.....cited .....	661
12 Op., 547.....cited .....	610
13 Op., 160.....followed .....	73
13 Op., 531.....followed .....	119
14 Op., 483.....cited .....	560
16 Op., 9.....cited .....	128
16 Op., 150.....cited .....	661
17 Op., 32.....cited .....	610
17 Op., 34.....cited .....	76
17 Op., 195.....concurred in .....	66
17 Op., 196.....reaffirmed .....	76
17 Op., 362.....reaffirmed .....	76
18 Op., 135.....followed .....	592
18 Op., 185.....followed .....	592
18 Op., 352.....cited .....	644
18 Op., 487.....cited .....	32
19 Op., 56.....followed .....	73
19 Op., 318.....followed .....	67
19 Op., 332.....followed .....	556
19 Op., 672.....cited .....	32
20 Op., 210.....followed .....	73
20 Op., 253.....cited .....	32
20 Op., 314.....followed .....	73
20 Op., 384.....cited .....	32

*Opinions of Attorneys-General Cited.*

XI

	Page
20 Op., 421..... cited .....	131, 582
20 Op., 440..... followed .....	119
20 Op., 459..... cited .....	32
20 Op., 524..... cited .....	32
20 Op., 536..... followed .....	556
20 Op., 539..... followed .....	73
20 Op., 613..... cited .....	619
20 Op., 690..... distinguished .....	62
21 Op., 24..... followed .....	55
21 Op., 24..... reaffirmed .....	132
21 Op., 101..... cited .....	590
21 Op., 109..... followed .....	556
21 Op., 130..... cited .....	661
21 Op., 159..... reaffirmed .....	54
21 Op., 174..... cited .....	32
21 Op., 178..... cited .....	700
21 Op., 181..... cited .....	700
21 Op., 188..... followed .....	86
21 Op., 188..... cited .....	700
21 Op., 224..... cited .....	38
21 Op., 240..... cited .....	32
21 Op., 251..... cited .....	38
21 Op., 267..... cited .....	26
21 Op., 283..... cited .....	590
21 Op., 300..... cited .....	135
21 Op., 357..... followed .....	544
21 Op., 369..... followed .....	73
21 Op., 454..... cited .....	32
21 Op., 506..... followed .....	119
21 Op., 509..... followed .....	119
21 Op., 530..... cited .....	700
21 Op., 543..... followed .....	592
21 Op., 557..... followed .....	73
21 Op., 568..... followed .....	556
21 Op., 583..... followed .....	73
22 Op., 13..... followed .....	101
22 Op., 77..... followed .....	119
22 Op., 163..... cited .....	131
22 Op., 184..... cited .....	14
22 Op., 237..... cited .....	14
22 Op., 342..... cited .....	32
22 Op., 360..... distinguished .....	533
22 Op., 413..... followed .....	86
22 Op., 413..... cited .....	700
22 Op., 420..... followed .....	86
22 Op., 557..... cited .....	96
22 Op., 581..... followed .....	86

	Page
22 Op., 581.....cited .....	700
23 Op., 1.....cited .....	700
23 Op., 2.....cited .....	700
23 Op., 3.....reaffirmed .....	44
23 Op., 86.....cited .....	700
23 Op., 136.....cited .....	52
23 Op., 221.....followed .....	60
23 Op., 330.....followed .....	60
23 Op., 331.....followed .....	102
23 Op., 377.....cited .....	584
23 Op., 406.....cited .....	661
23 Op., 431.....cited .....	700
23 Op., 431.....followed .....	553
23 Op., 468.....followed .....	86, 553
23 Op., 521.....cited .....	114, 555
23 Op., 545.....followed .....	544
23 Op., 545.....distinguished .....	638
23 Op., 574.....cited .....	53
23 Op., 586.....cited .....	700
23 Op., 599.....cited .....	53
23 Op., 625.....distinguished .....	54
24 Op., 1.....cited .....	557, 583
24 Op., 55.....followed .....	612
24 Op., 81.....cited .....	103
24 Op., 45.....reaffirmed .....	569
24 Op., 85.....cited .....	700
24 Op., 86.....followed .....	123
24 Op., 111.....reaffirmed .....	555
24 Op., 125.....distinguished .....	696
24 Op., 127.....cited .....	582
24 Op. 556.....cited .....	583
24 Op., 588.....cited .....	590

## INDEX TO SUBJECTS.

[See also Index—Digest, p. 711.]

### A.

	Page.
Alien contract labor laws, transfer of Chinese crew in a port of the United States.....	111, 553
Alien passengers, trans-shipment in port of the United States..	590
Aliens, right of master of foreign vessel to shackel, in port of the United States.....	531
American artist, citizen of Porto Rico.....	40
American Ephemeris and Nautical Almanac, and "the papers supplementary thereto" .....	663
American Tobacco Company, removal and destruction of merchandise held in bond .....	58
Appointment, army officer .....	89
relative rank of army officers .....	74
<i>(See also President.)</i>	
Appraiser of customs at Pittsburg, Pa .....	613
Appropriation, Census Office, act of March 3, 1903 (32 Stat., 1059) .....	699
"Arab," Danish steamer, transfer of Chinese crew in a port of the United States.....	553
Arms, military supplies, China.....	25
Army officers, appointment .....	89
indirect dismissal.....	89
trial of, for offense committed in Philippine Islands .....	570
relative rank of, Marine Corps.....	74
Army Regulations, 1901, paragraphs 196-199 .....	130
Assay, application of, to lead bullion.....	45, 569
Attorney-General, opinions:	
case actually arising in the administration	
of a department.....	59
conclusions of a Federal court.....	59
hypothetical questions .....	118
payments out of the Treasury.....	85
question committed to judicial review .....	59
questions involving administrative discretion and judgment.....	118



Attorney-General, opinions—Continued.	Page.
question for judicial determination .....	89
question not predicated upon a case actually arising .....	556
question of power of refund and payment out of the Treasury .....	553
reconsideration of, only in very exceptional cases .....	54
request for, must be accompanied by a state- ment of facts .....	102
Attorneys' fees in Loyal Creek claims .....	623
Award of coal contract for Post-Office Department .....	557

**B.**

Bills of lading, stamp tax on .....	44
Birkenwald, S. Co., Birkenwald's Daisy Sugar Corn, false labeling .....	695
Blunt, Capt. Hamilton H., indirect dismissal .....	89
Boston Molasses Co., of Boston, Mass., importation of molasses from Porto Rico .....	55
Bowman Act (22 Stat., 485), jurisdiction of Court of Claims ...	545
Branding or labeling food and dairy products .....	125, 675, 695
"Britannia," British cable-construction ship, tonnage tax .....	597
Brownell, Capt. Cornelius M., trial of .....	570
Burlaps, cotton bales, drawback .....	575
Butler, Lieut. William H., appointment .....	89

**C.**

Cable-construction ship, tonnage tax .....	597
Camel's hair noils, drawback .....	53
Census Office, employment, honorably discharged soldiers .....	64
appropriation of March 3, 1903 (32 Stat., 1059) ..	699
special agents .....	78
Certificate of merit, enlisted men, military service .....	127
enlisted men of the U. S. Marine Corps .....	579
Certificate of residence, Chinese, return certificate .....	132
Chief clerk of the War Department, authority to sign requis- itions .....	646
Chief officer of customs, deputy collector of customs .....	61
China, military supplies .....	25
Chinese crew, transfer of, in a port of the United States .....	111, 553
Chinese exclusion, contract labor .....	111
agents appointed by the Secretary of the Treasury .....	561
Chinese immigrant having a dangerous con- tagious disease .....	706
debts "pending settlement" .....	637
Treasury Department Circular No. 52 .....	91

# *Index to Subjects.*

xv

	Page
Chinese laborer, return certificate .....	91, 544
passengers, trans-shipment in port of the United States .....	590
person other than a laborer, return certificate.....	132
Choctaw and Chickasaw Indians, agreement of United States with, March 21, 1902, paragraph 41 (act of July 1, 1902, 32 Stat., 641) .....	689
Cigars from Philippine Islands, internal-revenue tax .....	120
Citizenship, Porto Rican, an American artist .....	40
"City of Peking," transfer of Chinese crew .....	111
Civil service, Department of State .....	95
political contributions .....	133
Regulations, rule 9 .....	103
reinstatement .....	103
transfer of temporary clerks to classified service ..	81
Claim for disallowances by the Treasury Department, Court of Claims .....	545
Coal contract of Post-Office Department, award of .....	557
Coastwise trade, American vessel in ballast from Manila .....	27
Collectors of customs, enforcement of Chinese exclusion laws ..	561
Collection of duty. (See Customs laws.)	
Commerce, military supplies, China .....	25
neutrality, military supplies .....	15
Common-law mistake of fact .....	34
Comptroller of the Treasury, opinions:	
question involving payments out of the Treasury .....	85
question of power of refund and payment out of the Treasury ..	553
Compulsory testimony, licensed officers of steam vessels .....	136
Condemnation of lands in the Philippine Islands for use as mil- itary posts .....	640
Confinement of Filipino convicted in consular court in China ..	549
Constitutional prohibition, gifts from prince or foreign State ...	116
Constitution of the United States, Article I, section 9, clause 9 ..	116
Constructive muster-in of State militia .....	651
Consuls, inspection cards, unofficial service .....	672
Contagious disease, Chinese immigrant suffering with .....	706
Contraband or war supplies .....	15
Contract, dry dock, excavation, shoring .....	82
subletting of, mail contract .....	541
Contract labor, transfer of Chinese crew .....	111
Court of Claims, Bowman Act, jurisdiction .....	545
Courts-martial, jurisdiction, civil courts of Philippine Islands ..	570
Cruiser Galveston, release from possession of State court .....	679
Cunard Steamship Co., duty on steel shaft landed and kept in United States .....	533
Customs laws, assay, imported lead bullion .....	45, 569

	Page
Customs laws, drawback, camel's hair noils .....	53
cotton bales, burlaps.....	575
Honolulu a Pacific port.....	6
duties in case of forfeiture.....	1
collection of, on goods prohibited from entry.....	556
collected on smuggled goods treated as a fine.....	583
on steel shaft landed and kept in United States for use on foreign vessel .....	533
entry of goods bearing foreign trade-mark.....	551
free entry of philosophical or scientific instruments .....	28
paintings of American artist residing abroad .....	40
free importation of Porto Rican products .....	55
informer's compensation .....	61
liquidation of duties, refund.....	34
release of goods subject to forfeiture.....	588
removal and destruction of merchandise held in bond .....	58
seizure and destruction of fur-seal skins unlawfully imported.....	577
smuggling, seizure, and forfeiture .....	583
remission of penalties.....	583
storage charges, etc., collected in Porto Rico....	621
tobacco grown in Porto Rico, free importation ..	612
Cotton bales, burlaps, drawback.....	575

**D.**

Dairy and food products, false labeling.....	125, 675, 695
Dangerous contagious diseases, Chinese immigrant.....	706
Debts—"pending settlement," Chinese-exclusion laws.....	637
Department of Agriculture dairy and food products .....	675
Department of Commerce and Labor, naming of bureaus in....	697
Department of Labor, change of name, as a bureau in Department of Commerce and Labor .....	697
Department of State, civil service.....	95
Departmental practice, Department of Justice. (See Attorney-General.)	
Deputy collector of customs, chief officer of customs.....	61
Destruction of fur-seal skins unlawfully imported.....	577
Distribution of United States Supreme Court Reports .....	106
District of Columbia, eviction of unlawful occupants of public lands in.....	616
Dollar Steamship Co., transfer of Chinese crew in a port of the United States.....	554

# *Index to Subjects.*

**XVII**

	<b>Page</b>
Drawback, camel's hair noils.....	53
coal imported and used on vessel plying between New York and Honolulu.....	6
cotton bales, burlaps.....	575
imported lead bullion, assay.....	569
Drawback law contemplates the manufacture of a separate and complete article.....	53
Dry dock, contract, excavation, shoring.....	82
Dry dock at Norfolk, Va., jurisdiction of State board of harbor commissioners.....	50
Duty collected on smuggled goods treated as a fine.....	583
collection of, on goods prohibited from entry.....	556
in case of forfeiture.....	1
on steel shaft landed and kept in United States for use on foreign vessel.....	533

## **E.**

Eminent domain, Philippine insular government.....	640
State governments.....	640
Employment of honorably discharged soldiers in Census Office.....	64
"Endeavor," American vessel from Manila, entry, manifest....	27
Entry, manifest, American vessel in ballast from Manila.....	27
"Etruria," duty on steel shaft landed and kept in United States.....	533
Eviction of unlawful occupants of public lands in the District of Columbia.....	616
Export bills of lading, stamp tax on.....	44

## **F.**

False labeling of dairy and food products.....	125, 675, 695
Federal building site in Honolulu.....	600
Federal courts. ( <i>See</i> United States courts.)	
Fees of consuls for furnishing inspection cards.....	672
Filipino convicted in consular court in China, confinement of..	549
Fines, penalties, forfeitures, etc., collected in Porto Rico by customs officials, disposition of.....	621
Fish Commission, change of name as a bureau in Department of Commerce and Labor.....	697
Food and dairy products, false labeling.....	125, 675, 695
Foraker or Porto Rican act.....	55
Foreign cable construction ship, tonnage tax.....	597
Foreign trade-mark, entry of goods bearing.....	551
Franklin Sugar Refining Company of Philadelphia, liquidation of duties, refunded.....	34
Free entry of philosophical or scientific instruments.....	28
Porto Rican products.....	55
Fur-seal skins unlawfully imported, seizure and destruction of.....	577

**G.**

	Page
Galveston, cruiser, release from possession of State court .....	679
General appraiser, office, incompatible service .....	12
General appraisers, hearing before two members of the tea board .....	634
G. A. 1595, 2002, 3262 .....	47
2725 .....	54
4029, 1884 .....	35
4917, 4918 .....	30
4032 .....	36
5040 .....	31
German letters rogatory .....	69
Gift enterprise, lottery .....	563
Gifts from prince or foreign state .....	116
Good, Walter W., telegraph grant .....	603

**H.**

Hamley Brothers, of London, England, "Ping Pong" .....	551
Hawaii, acquisition of Federal building site in Honolulu .....	600
Honolulu, a Pacific port, drawback .....	6
Head tax, alien passengers, trans-shipment .....	590
immigrant fund, Porto Rico .....	86
Herz Brothers, of New York City, importation of tobacco from Porto Rico .....	55
Hodge, David M., attorney's fees in Loyal Creek claims .....	623
Home Co-operative Company, of Kansas City, Mo. ....	563
Honolulu, acquisition of Federal building site in .....	600
a Pacific port, drawback .....	6
Horses, military supplies, neutrality .....	15

**I.**

Identification of part-blood Mississippi Choctaw Indians .....	689
Illfelder & Co., of New York, Ping Pong .....	551
Immigrant, right of master of foreign vessel to shackle, in port of United States .....	531
Immigrant fund, head tax, Porto Rico .....	86
Immigration laws, Chinese person with dangerous contagious disease .....	706
Incompatible service, office .....	12
Indians, identification of part-blood Mississippi Choctaws .....	689
Indirect dismissal of one officer by confirmation of nomination of another .....	89
Induction of State militia into the military service of the United States .....	651
Informers' compensation .....	61
Inspection cards, furnished by consuls, unofficial services .....	672
Issuance of search warrants by United States commissioners .....	685

# Index to Subjects.

XIX

	Page
Internal-revenue tax on cigars from Philippine Islands.....	120
on tobacco grown in Porto Rico and brought	
to the United States.....	612
(See also Stamp tax.)	
International agreement in regard to wireless telegraphy.....	100

## J.

Jurisdiction of State court of Virginia over cruiser Galveston ..	679
of State harbor commissioners, Norfolk, Va .....	50
of civil and military courts in Philippine Islands..	570

## K.

"Korea," transfer of Chinese crew to .....	111
--	-----

## L.

Labeling food and dairy products.....	125, 675, 695
Lead bullion, application of assay to.....	45, 569
statutory percentages of refined metal.....	569
Legacy taxes, refunding of .....	98
Letters rogatory issued out of German patent office, execution	
of in United States .....	69
Congressional legislation recommended .....	69
Licensed officers of steam vessels, compulsory testimony. ....	136
Liquidation of duties, refund, mistake of fact .....	34
Lottery, gift enterprise, scheme of chance .....	563
Louisiana, cessions of land to the United States, reservations in.	617
Loyal Creek claims, attorneys' fees.....	623

## M.

Machen Brothers, award of coal contract for Post-Office Depart- ment .....	557
McCalla, Commander Bowman H., relative rank, position on navy list .....	606
Mail contract, subletting of.....	541
from Philippine Islands should comply with the laws of the United States .....	534
Manifest, American vessel in ballast from Manila .....	27
Marine Corps, enlisted men of, certificate of merit.....	579
officers of, relative rank.....	74
rank and pay of retired officers of.....	709
Marine-Hospital Service, tonnage tax, Porto Rico .....	122
Masters of foreign vessels, right to shackle aliens in port of the United States.....	531
Medal of honor, officer or private, military service.....	580
Merchandise held in bond, removal and destruction of .....	58
Military courts, Philippine Islands.....	570

	Page
Military service, certificate of merit .....	127
medal of honor .....	580
of the United States, induction of State militia into .....	651
Military supplies, arms, China .....	25
horses, neutrality .....	15
Mississippi Choctaw Indians, part blood, identification of .....	689
Mistake of fact, liquidation of duties, refund .....	34

**N.**

National Bureau of Standards, services to State institutions ....	667
Naval officers, relative rank, pardon, Commander Bowman H. McCalla .....	606
Neutrality, military supplies, horses .....	15
Norfolk, Va., jurisdiction of State board of harbor commissioners ..	50

**O.**

Office, incompatible service, general appraiser .....	12
Officer of the United States, gifts from prince or foreign state ..	116
Officers of steam vessels, compulsory testimony .....	136
Opinions. ( <i>See</i> Attorney-General.)	

**P.**

Pacific Mail Steamship Company, transfer of Chinese crew in a port of the United States .....	554
Panama canal title .....	144
Pardon, effect of, on relative rank of naval officer .....	606
Parker Brothers, of Salem, Mass., "Ping Pong" .....	551
Peel, S. W., attorney's fees in Loyal Creek claims .....	623
Penalty envelopes, postal service of the Philippine Islands .....	534
Permanent Census Office. ( <i>See</i> Census Office.)	
Philippine insular government, eminent domain .....	640
Philippine Islands, American vessel, entry, manifest .....	27
civil courts of, jurisdiction of courts-martial .....	570
internal-revenue tax on cigars from .....	120
postal service in .....	534
Philippine prison, confinement in, of Filipino convicted in con- sular court in China .....	549
Philosophical or scientific instruments, free entry .....	28
"Ping Pong," trade-mark, Parker Brothers, of Salem, Mass. ....	551
Pittsburg, Pa., appraiser of customs at .....	613
Political contributions, civil-service law .....	133
Porto Rico, citizen of, American artist .....	40
disposition of storage charges, fines, penalties, etc., collected by customs officials .....	621
free importation of products from .....	55
free importation of tobacco grown in .....	612

# Index to Subjects.

XXI

	Page.
Porto Rico, head tax, immigrant fund.....	86
public laws of.....	8
tonnage tax.....	122
Postal service of the Philippine Islands, penalty envelopes.....	534
Post-Office Department, award of coal contract.....	557
Power of the Secretary of the Treasury to release goods subject to forfeiture.....	588
Preferment of honorably discharged soldiers.....	64
President, appointment of student interpreters at legation to China.....	52
authority to take public lands of Hawaii for purposes of the United States.....	600
certificate of merit, enlisted man of the Army.....	127
fees of consuls in furnishing inspection cards.....	672
medal of honor.....	580
Prince Henry of Prussia, gifts from.....	116
Public lands of Porto Rico.....	8

## Q.

Quarantine regulations of April, 1903, inspection cards.....	672
--	-----

## R.

Rank and pay of retired officers of the United States Marine Corps.....	709
Refund, liquidation of duties, mistake of fact.....	34
Refunding of legacy taxes.....	98
Reinstatement, civil service.....	103
Relative rank, of officers of the Marine Corps.....	74
of naval officer, Commander Bowman H. McCalla.....	606
Release of cruiser <i>Galveston</i> from possession of State court.....	679
Remission of penalties, smuggling, Secretary of the Treasury..	583
Removal and destruction of merchandise held in bond.....	58
Reservations in State cessions of lands to the United States....	617
Return certificate, Chinese person other than a laborer.....	132
Chinese laborer.....	544
Return Postage Clearing Company.....	118
Revocation of license of officer of steam vessel.....	136
Right of master of foreign vessel to shackle alien in port of the United States.....	531
River and harbor improvement, construction of statutes.....	594
Rogers, Mrs. Marian K., reinstatement.....	103
"Round lap" bales of cotton, drawback.....	575

## S.

Scheme of chance, lottery.....	563
Search warrants, issuance of by United States commissioners..	685
Secretary of the Navy, printing of the American Ephemeris and Nautical Almanac.....	663



	Page.
Secretary of the Treasury, acquisition of site for Federal building in Honolulu .....	600
agents appointed by, to enforce Chinese-exclusion laws .....	561
authority to refund duties erroneously collected on ground of mistake .....	34
authority to revive office of appraiser of customs at Pittsburg, Pa. ....	613
informer's compensation .....	61
power to release goods subject to forfeiture .....	588
regulation in regard to requests upon National Bureau of Standards ....	667
reference of matter of disallowance to Court of Claims .....	545
remission of penalties .....	583
Secretary of War, river and harbor improvement .....	594
Seizure and destruction of fur-seal skins unlawfully imported ..	577
Scientific instruments, free entry .....	28
Services of consuls in furnishing inspection cards, unofficial services .....	672
Services of National Bureau of Standards to State institutions ..	667
"Siberia," steamer, transfer of Chinese crew to, in a port of the United States .....	553
Sixth Massachusetts Militia, induction into the military service of the United States .....	651
Stipulation authorized by section 3753, Revised Statutes. Cruiser "Galveston" .....	679
Smuggling, seizure, and forfeiture, remission of penalties .....	583
Solicitations of political contributions by Federal officers .....	133
South Africa, military supplies, horses .....	15
Special agents, Census Office .....	78
Stamp tax on export bills of lading .....	44
"Stanley Dollar," Danish steamer, transfer of Chinese crew in a port of the United States .....	553
State cessions of land to the United States, reservations in .....	617
State militia, induction of, into the military service of the United States .....	651
Statutes interpreted. ( <i>See</i> p. 750.)	
Statutory construction. ( <i>See</i> p. 754.)	
Storage charges, fines, etc., collected in Porto Rico by customs officials, disposition of .....	621
Student interpreters at legation to China .....	52
Subletting of mail contract .....	541
Sullivan, Sergt. Patrick J., certificate of merit .....	579

# Index to Subjects.

XXIII

## T.

	Page.
Tea board of the General Appraisers, hearing before two members of the.....	634
Telegraph grant, acceptance of provisions of the act of July 24, 1866 (14 Stat., 221).....	603
Tobacco grown in Porto Rico, free importation.....	612
Tonnage tax on foreign cable construction ship.....	597
Porto Rico, Marine-Hospital Service.....	122
Trade-mark, entry of goods bearing foreign trade-mark.....	551
Transfer of Chinese crew within a port of the United States....	111, 553
Transfer of temporary clerks to classified service.....	81
Trans-shipment of alien passengers in port of the United States.	590
Treasury decision 3653.....	55
10535, 19501.....	48
17978, 18036, 18198.....	34
20306; article 1425 of Treasury Regulations of 1899.....	5
22008, 22146, 22169, and 22218.....	2
Treasury Department Circular No. 52, Chinese exclusion.....	91
Treasury Department, dairy and food products.....	675
not required to collect duty on goods prohibited from entry.....	556
practice of exacting duties where forfeiture prevails.....	1
Treasury regulations, application of assay to lead bullion.....	45, 569
Treaty with China of December 8, 1894, Article II (28 Stat., 1210).....	91, 132, 544, 637
with Choctaw Nation, September 27, 1830 (7 Stat., 333).....	689
of Paris of December 10, 1898, Article VIII (30 Stat., 1754). Public lands in Porto Rico.....	8
Trigg, William R. Co., of Richmond, Va., cruiser Galveston...	679
Trombley v. Humphrey (23 Mich., 472), held to be erroneous..	640

## U.

"Umbria," duty on steel shaft landed and kept in United States.	533
United States commissioners, issue of search warrants.....	685
United States courts, execution of German letters rogatory....	69
United States, international agreement, wireless telegraphy....	100
jurisdiction over Norfolk Harbor, Va.....	50
United States Marine Corps, rank and pay of retired officers of.	709
United States Senate, confirmation of nomination of one army officer the indirect dismissal of another.....	89
United States Supreme Court Reports, distribution of.....	106
Unofficial service of consuls in furnishing inspection cards.....	672

## V.

Virginia, jurisdiction of State harbor commissioners, Norfolk Harbor.....	50
---	----

**W.**

	<b>Page.</b>
War Department, authority of chief clerk to sign requisitions..	646
postal service of the Philippine Islands.....	534
War-emergency employees, civil service.....	95
War-revenue act of June 13, 1898, export bills of lading.....	44
Wireless telegraphy, international agreement.....	100
Wong Joe Jun, Chinese passenger with dangerous contagious disease.....	706
Words and phrases. ( <i>See</i> Index-digest.)	

OPINIONS  
OF  
HON. PHILANDER C. KNOX, OF PENN-  
SYLVANIA.

APPOINTED APRIL 5, 1901.

---

CUSTOMS DUTIES IN CASES OF FORFEITURE.

Regular duties may be exacted on an importation of foreign goods, notwithstanding the goods have been seized and forfeited for a violation of section 9 of the customs administrative act of June 10, 1896 (26 Stat., 135), and the whole of the proceeds from their sale applied to the use of the United States.

There is no authority for the practice of the Treasury Department to exact duties, when forfeiture prevails, only in those cases which arise under section 32 of the tariff act of July 24, 1897 (30 Stat., 211, 212), and not in other customs revenue cases involving forfeiture.

DEPARTMENT OF JUSTICE,  
*March 12, 1902.*

SIR: I am in receipt of your letter of February 12, asking for an expression of my opinion as to whether the Government is authorized to exact duties on an importation of foreign goods when said goods are seized, forfeited, and the whole of the proceeds applied to the use of the United States.

It appears from your letter that an importation of a quantity of tobacco was made and entered for warehouse at the port of New York, that a portion of the tobacco was seized and forfeited for violation of section 9 of the act of

June 10, 1890, that the proceeds of the sale were less than the duties which would have accrued but for the forfeiture, had the tobacco been withdrawn for consumption, and that the collector demanded of the importers payment of a sum equivalent to the duty, less the proceeds from the sale, basing his action on Treasury decisions 22008, 22146, 22169, and 22218, in relation to the collection of 50 per cent additional duties under section 7 of the customs administrative act as amended by section 32 of the act of July 24, 1897. You state further that "it has been and is the practice to exact duty when forfeiture prevails only in cases arising under section 32 of the act of July 24, 1897; in other customs revenue cases involving forfeiture and sale the importer is not required to pay duties."

The duty on tobacco (not manufactured) is a specific duty. Section 7 of the customs administrative act of June 10, 1890, as amended by section 32 of the act of July 24, 1897, refers exclusively to merchandise on which an ad valorem duty is imposed, and the question as to the collection of additional duties under that section can not arise in this case.

The question to be considered hinges on the construction of section 9 of the customs administrative act of June 10, 1890, which provides that if any owner, importer, etc., shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, etc., or by means of any false or fraudulent practice or appliance whatsoever, etc., by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise—

\* \* \* "such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited \* \* \* ; and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

This section provides two penalties—one against the goods and one against the person. The one against the goods has been adjudged and executed. It seems that criminal prose-

cution under the section is not involved or invoked. Have the remedies been exhausted, or is the United States now entitled to assess and collect the regular duties notwithstanding the forfeiture?

The tariff act of July 24, 1897, prescribes the "lawful duties" which shall be "levied, collected and paid" upon imported merchandise. There can be no doubt that duties accrue to the United States upon importation. In *Meredith v. United States* (13 Pet., 486, 493) it was held that "the duties due upon all goods imported constitute a personal debt due to the United States from the importer (and the consignee for this purpose is treated as the owner and importer) independently of any lien on the goods and any bond given for the duties." As the syllabus puts it, "the importers of goods do, in virtue of the importation thereof, become personally indebted to the United States for the duties thereon." The case of *United States v. Boyd* (23 Blatchf., 299) speaks of the "very ancient doctrine that duty lies for customs due upon merchandise even though the goods are forfeited." (*United States v. A Cargo of Sugar*, 3 Sawy., 27.) This is the import of the common-law authorities. (*Salter v. Malapert*, 1 Roll. Rep., 383.) From this decision Chief Baron Comyns (Dig. Debt, A. 9) deduced the principle that under the head of debt upon contract implied the law is that debt lies for customs due for merchandise though the goods are forfeited for non-payment. The opinion of the court of exchequer was that "duties were due by the unloading." (*Swinerton v. Wolstonholme*, reported in Sir Matthew Hale's Treatise on the Customs: Harg. L. T., 214.)

These doctrines are followed in cases which unquestionably hold that the payment of duties is no bar to a subsequent proceeding to forfeit; that if the duties remain unpaid, proceedings to forfeit, whether determined in favor of the Government or the importer, do not terminate the Government's right to enforce the liability for duty. The importer "loses as well the duties paid or secured as the property seized and condemned." (*Hoyt v. United States*, 10 How., 137; *Wood v. United States*, 16 Pet., 362; *Taylor v. United States*, 3 How., 197.) "The circumstance that the duties have not been paid when the proceeding to forfeit the goods

is instituted is, in reason, attended with no difference in favor of the importer. If the proceeding is groundless, the goods are to be restored to him, but the regular duties are to be paid. If the goods are condemned, he loses them, but this does not exempt him from liability for the duties." (Opinion of district court for eastern district of Pennsylvania, Cadwalader, J., in *United States v. Segars*, 3 Phil. Rep., 517, 522.) This case cites *Meredith v. United States* (13 Pet., p. 493), in which the Supreme Court approved a decision of the English court of exchequer (Anstr., 558) that even "where a dutiable article was lost or destroyed by a casualty before it became available to the party personally liable for the duty, his liability nevertheless continued." It seems, then, that, as in other branches of the law, the civil liability is not avoided because the punitive remedy has been pursued.

Some of the authorities cited refer to forfeiture for fraudulent undervaluation rather than for entry on false or fraudulent invoice, and involve considerations respecting additional duties which under some laws are penal and under others are not. The two offenses lie close together, and the underlying principles are applicable *a fortiori* to the graver offense of entry by means of a false invoice or "any false or fraudulent practice or appliance whatsoever."

While the authorities appear to be unanimous that in cases of fraudulent undervaluation as well as of fraudulent or false invoices, forfeiture and the collection of regular duties may proceed *pari passu*, the Supreme Court declared in the case of the *67 Packages of Dry Goods* (17 How., 85, 94) that if *additional duty* has been levied, the Government can not forfeit (see also *Murray v. Arthur*, 13 Blatchf., 413), upon which the Treasury Department based rulings under earlier laws to the effect that the Government may "sue for forfeiture or impose the *additional duty*, but it can not do both." (Art. 896, regulations for 1892; see also unpublished ruling of 1878.) This seems to have been the Treasury rule until the existing form of section 7 of the customs administrative act became law (sec. 32, act of July 24, 1897), when, upon the express requirements of that section, and the provision that additional duties shall not be construed

to be penal, the Treasury regulations were changed and the rule adopted contemplates regular duties, additional duties and forfeiture as well in proper cases coming within the law. (T. D. 20306; art. 1425 of Treasury regulations of 1899.) The Government construction of section 32 aforesaid has been sustained by the courts. (*United States v. 1,621 Pounds of Fur Clippings*, 106 Fed. Rep., 161; *United States v. Gray*; *United States v. Baldwin*, 107 Fed. Rep., 104.)

It is thus clear that the rulings of the Treasury Department under earlier laws manifestly referred to the incompatibility of forfeiture and *additional duties*. On the other hand, the Treasury published rulings show that the *regular* duties must be collected even if the goods are forfeited. (Art. 1092, Regulations of 1884.) This accords with the decisions as referred to above.

In *United States v. 500 Boxes of Pipes* (2 Abb., 500), it is held that regular duties are due and payable upon a decree in favor of claimants in forfeiture proceedings; and in *United States v. Segars, ut supra*, it was held that regular duties should be exacted where the goods were forfeited, and that it makes no difference whether the duties have or have not been paid at the time of forfeiture, or whether the forfeiture proceedings result in favor of the claimant or the Government.

I have traced this subject somewhat minutely, because your letter states that it is not the practice of your Department in customs revenue cases other than those arising under section 32 of the act of July 24, 1897, to require an importer to pay duties when there has been a forfeiture and sale of his goods; but I am constrained to say that I find no authority for this practice, either in the decisions of the courts or the rulings of your Department. And I can find no intimation to that effect in the decision of the circuit court of appeals in the *Baldwin* case which you mention, not yet reported. [113 Fed. Rep., 217.]

It is obvious, under the peculiar rule of paragraph 213 of the Dingley tariff act, which applies the wrapper tobacco duty to an entire package of filler tobacco if it contains more than 15 per cent of wrapper tobacco, that a very oner-



ous burden might be placed upon consignees who are themselves wholly innocent of any intention to defraud. If the question here turns upon that situation and such are the facts, it is the misfortune of the consignees here to be burdened or punished for the faults of others; but I can not perceive how any equity which they might show may be recognized consistently with the law. I advise you that the Government is authorized to exact duties on an importation of foreign goods when said goods are seized, forfeited and the whole of the proceeds applied to the use of the United States.

Very respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

---

HONOLULU A PACIFIC PORT—DRAWBACK.

Honolulu is a Pacific port of the United States within the meaning of the tariff act of July 24, 1897 (30 Stat., 151, 190), and coal imported into the United States, which is afterwards used for fuel on board a vessel propelled by steam plying between the ports of New York and Honolulu and registered under the laws of the United States, is entitled to drawback under paragraph 415 of that act.

DEPARTMENT OF JUSTICE,

*March 19, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 13th instant relative to the allowance of drawback, under the provisions of paragraph 415 of the tariff act of July 24, 1897, on coal used as fuel on board a vessel registered under the laws of the United States and propelled by steam and plying between the ports of New York and Honolulu. You ask for an opinion as to whether Honolulu is a Pacific port of the United States within the meaning of said paragraph.

It is provided in said paragraph "that on all coal imported into the United States which is afterwards used for fuel on board vessels propelled by steam and engaged in trade with foreign countries, or in trade between the Atlantic and Pacific ports of the United States, a drawback

shall be allowed equal to the duty imposed by law upon such coal, and shall be paid under such regulations as the Secretary shall prescribe."

In the act to provide a government for the Territory of Hawaii (31 Stat., 161, sec. 98), it is provided that all vessels carrying Hawaiian registers on August 12, 1898, and owned by citizens of the United States or citizens of Hawaii, "shall be entitled to be registered as American vessels, with the benefits and privileges appertaining thereto, and the coasting trade between the islands aforesaid and any other portion of the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts."

Section 88 of the same act provides "that the Territory of Hawaii shall comprise a customs district of the United States, with ports of entry and delivery at Honolulu, Hilo, Mahukona, and Kahului."

It was held in *Huus v. New York and Porto Rico Steamship Company* (182 U. S., 392) that vessels engaged in trade between Porto Rican ports and ports of the United States are engaged in the coasting trade, and that steam vessels engaged in such trade are coastwise vessels under Revised Statutes. Mr. Justice Brown, speaking for the court, said (p. 396): "At the same time trade with that island is properly a part of the domestic trade of the country since the treaty of annexation, and is so recognized by the Porto Rican or Foraker act. By section 9, the commissioner of navigation is required to 'make such regulations \* \* \* as he may deem expedient for the nationalization of all vessels owned by the inhabitants of Porto Rico on April 11, 1899, \* \* \* and for the admission of the same to all the benefits of the coasting trade of the United States; and the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States.' By this act it was evidently intended, not only to nationalize all Porto Rican vessels as vessels of the United States, and to admit them to the benefits of their coasting trade, but to place Porto Rico substantially upon the coast of the United States, and vessels

engaged in trade between that island and the continent as engaged in the coasting trade."

Congress in providing for the refunding of the duty on coal afterwards used as fuel on board American steam vessels engaged in trade "between the Atlantic and Pacific ports of the United States" thereby made a distinction in favor of American vessels engaged in the coasting trade carried on by long voyages around the Horn as against those engaged in other coasting trade. A special privilege was granted the former, and there is every reason to believe that Congress in passing the Hawaiian act intended to extend to American coastwise vessels trading there not only the privileges and laws common to all American coastwise vessels and trade, but the particular law and privilege concerning such vessels engaged in the long voyage around the Horn.

Hawaii is in the Pacific, is not so far south as Porto Rico, nor so far west as the western ports of Alaska. If the Porto Rican act placed Porto Rico "substantially upon the coast of the United States," it is difficult to perceive why the Hawaiian act, almost identical in language, did not place Hawaii substantially upon the coast.

I am therefore of the opinion that Honolulu is a Pacific port of the United States within the meaning of paragraph 415 of the act of July 24, 1897.

Respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

---

#### PUBLIC LANDS OF PORTO RICO.

The so-called "public lands" of Porto Rico which, prior to the treaty of Paris of December 10, 1898 (30 Stat., 1754), belonged to Spain, were, by that treaty, ceded to and now belong to the United States, and not to Porto Rico.

DEPARTMENT OF JUSTICE,

*March 19, 1902.*

SIR: I have received your letter of the 6th instant requesting my opinion "upon the question presented in the accompanying report of the commissioner of the interior for Porto Rico, for the fiscal year ended June 30, 1901, as

to whether the so-called 'public lands' of Porto Rico were ceded as 'Crown lands' to the United States by the treaty of Paris concluded December 10, 1898, and proclaimed April 11, 1899 (30 Stat., 1754), or were they and did they remain the property of Porto Rico as 'State lands?'"

You inclose a letter from the governor of Porto Rico, dated February 14, 1902, concerning a bill in Congress giving supervisory authority to the Secretary of the Interior over the public lands in Porto Rico.

Upon examining the report of the commissioner of the interior for Porto Rico, the question presented there is found to be whether, in view of Article VIII of the treaty of Paris, the lands in Porto Rico not owned by individuals but by the public, and not being in public use for roads, buildings, etc., belonged to the province or island of Porto Rico, instead of to the Crown of Spain, and now belong to Porto Rico rather than to the United States.

The commissioner of the interior for Porto Rico quotes Article VIII of the treaty as ceding in Porto Rico "all the buildings, wharves, barracks, forts, structures, public highways, and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the crown of Spain," and declaring that the cession should not "in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds of provinces, municipalities, public or private establishments, ecclesiastic or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories, renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be."

The commissioner says that "no other provision for the cession of public lands in Porto Rico appears in the treaty," and that the Civil Code of Spain, extended to Porto Rico by decree of July 31, 1889, provides:

"ART. 338. Property is of public or private ownership.

"ART. 339. Property of public ownership is—

"1. That destined to the public use, such as roads, canals, rivers, torrents, ports, and bridges constructed by the State, and banks, shores, roadsteads, and that of a similar character.

"2. That belonging exclusively to the State without being for public use and which is destined to some public service or to the development of the national wealth, such as walls, fortresses, and other works for the defense of the territory, and mines, until their cession has been granted.

"ART. 340. All other property belonging to the State which has not the conditions stated in the preceding article is considered as private property."

The commissioner then says:

"The definition of property of public ownership is quite clearly given, and does not embrace 'public lands,' as the expression is understood and applied in the United States, but article 340 classifies such lands, if the property of the State, as private property.

"The point I would raise is whether the so-called 'public lands' of Porto Rico were ceded to the United States by the treaty of Paris as 'Crown' lands, or were they and do they remain the property of Porto Rico as 'State' lands."

I shall endeavor to answer the question as I presume you would wish to have it stated rather than as it has been formulated by the commissioner.

The commissioner makes a fundamental mistake in assuming that Article VIII is the only provision of the treaty to be interpreted. By Article II Spain ceded to the United States "the island of Porto Rico."

It might be admitted that Article VIII of the treaty concerns only buildings, wharves, highways, and other like property without thereby admitting that the lands now in question do not belong to the United States. It may be that the purpose of Article VIII was to cede only such property as article 339 of the civil code embraces under property of public ownership. It by no means follows that the lands not mentioned by Article VIII as such property were, by virtue of the same treaty, to "remain the property of Porto Rico as 'State' lands."

The treaty did not cede anything to Porto Rico. It ceded the island to the United States. If, then, the lands now in question did not belong to Porto Rico before the cession, the treaty has not transferred to Porto Rico the title, but has transferred it as part of the title to the island itself to the United States.

The latter part of Article VIII does not purport to give the province of Porto Rico anything it did not already own.

Porto Rico unquestionably belonged to Spain by right of discovery and conquest, in consequence of the exertions of the people and Government of Spain, and not of any exertions of any people of Porto Rico. The public lands of Porto Rico, as we understand the expression, thus came into the ownership of the Spanish Government subject to the rights of the Indians, who have gradually disappeared. The lands there not owned by individuals are commonly spoken of as lands of the State (*estado*), and the State means not Porto Rico but Spain.

Exh. R, App. II Rep. Evac. Commission, Porto Rico.

Rep. Gen. Davis on Civil Aff., P. R., 1899, pp. 41, 240.

Rep. Commissioner Int. for P. R., 1900, pp. 5, 8.

Rep. on P. R., by Carroll, 1899, p. 512.

56, 2nd, Sen. doc. 117, pp. 6, 7.

Regulations, Law of Em. Domain, Porto Rico (royal decree, 1879), art. 16.

Provincial and Municipal Laws, Porto Rico (royal decree, 1896), chap. 3, art. 14.

Law of Railroads, Porto Rico (royal decree, 1887), Chap. IV, art. 31; Chap. X, art. 63.

Regulations for execution of above, Chap. II, art. 7, 10.

Law of Public Works, Porto Rico, Chap. I, arts. 1, 2, 3, 4, 5; Chap. VIII, art. 94, 95, 106, 108, 112; Chap. IX, art. 116.

Regulations for execution of above, Chap. VIII, art. 122.

Mining Law, Porto Rico (royal decrees, 1883, 1884), Chap. I, art. 2.

I have not found in the laws of the Indies or any of the royal *cédulas*, orders or decrees concerning Porto Rico that for any good or valuable consideration, or otherwise, the title to lands acquired by Spain through the discovery and conquest was transferred to the people of the island or province or to its government.

Provinces of Spain, and Porto Rico was one, were capable of owning and did own lands (see citations above). They usually owned them, however, as our States of recent admission to the Union have owned small quantities of former public lands of the United States through special

12 *General Appraiser—Office—Incompatible Service.*

grants by Congress in aid of internal improvements, education, etc., or as the States own land acquired from individuals in consequence of debts and taxes (*Alcubilla, Diccionario de la Administracion Española*). It may be that the records at San Juan show that the province of Porto Rico owned some land in this way. If so, the latter part of Article VIII of the treaty may embrace its title.

But I understand your question to concern the general mass of what we should call "public lands." These, in my opinion, belonged to Spain, and, by virtue of the treaty of Paris, now belong to the United States.

Respectfully,

P. C. KNOX.

The SECRETARY OF THE INTERIOR.

---

GENERAL APPRAISER—OFFICE—INCOMPATIBLE SERVICE.

The provision in section 12 of the customs administrative act of June 10, 1890 (26 Stat., 136), directing that a general appraiser "shall not be engaged in any other business, avocation, or employment," is not applicable to the case of a general appraiser detailed by the Secretary of the Treasury, without additional compensation, as "an expert to represent the United States in the international commission for the conversion of the present Chinese tariff into specific rates." That provision, in connection with other provisions of the law, means that such officer can not hold another office under the Government or be engaged in other incompatible Government service.

There is no incompatibility between the office of general appraiser and the special service of expert for which such officer was detailed, the latter service being a mere employment without compensation, and not an office.

DEPARTMENT OF JUSTICE,

*April 2, 1902.*

SIR: Your request to the Secretary of State to make a report to you in connection with the Treasury and the Attorney-General's Office on the status of Mr. Thaddeus S. Sharretts, a member of the Board of General Appraisers, has come to me from the Secretary of the Treasury after consideration by him and the Secretary of State.

It seems that in August of last year the State Department requested the Treasury Department to "detail an expert to

represent the United States in the international commission for the conversion of the present Chinese tariff into specific rates." After intermediate correspondence the Secretary of the Treasury selected Mr. Sharretts as such representative of the United States, and thereupon the latter proceeded to China upon this special service under the auspices of the Departments of State and the Treasury, where he now is. I draw from the memoranda of those Departments on the subject the following additional facts:

That the service of an expert in the adjustment of the Chinese tariffs was necessary and important for the interests of the United States; that Mr. Sharretts was well qualified by his ability and experience to perform the necessary duties; that while these duties in connection with the international commission are not the usual duties of a United States general appraiser, the Secretary of the Treasury did not believe that the provision of the customs administrative act (sec. 12, act of June 10, 1890), directing that a general appraiser "shall not be engaged in any other business, avocation, or employment" had any application here; that Mr. Sharretts is not in receipt of any pay or emoluments on account of this special service; that his actual and necessary expenses only, while attending to the revision of the Chinese tariff, are paid by the Department of State in accordance with the understanding had with the Treasury Department.

In *United States v. Maurice* (2 Brock., 96) Chief Justice Marshall says:

"An office is defined to be 'a public charge or employment,' and he who performs the duties of the office is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or perform a service, without becoming an officer. But if a duty be a continuing one, \* \* \* it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer."



14 *General Appraiser—Office—Incompatible Service.*

In *United States v. Hartwell* (6 Wall., 385, 393) the definition is as follows:

“An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in public service of the United States. \* \* \* His duties were continuing and permanent, not occasionally or temporary.”

These views have been invoked in rulings which hold that certain special employment or additional service is not incompatible with an office under the United States, and does not even preclude the payment of compensation for the special employment under the prohibitions of sections 1763–1765, Revised Statutes, and section 2 of the act of July 31, 1894, 28 Stat., 162, 205 (22 Opin., 184; 2 Comp. Dec., 271; id., 467). Here the question of additional compensation is not involved, and it seems clear that the special service does not constitute an office. Inasmuch as Mr. Sharretts receives no additional compensation and does not fill two distinct places, his case is not covered in either aspect by *United States v. Saunders* (120 U. S., 126), which held (prior to the act of 1894 above cited) on the one hand that where there are two distinct offices or employments, each with its own duties and compensation, both may be held by one person at the same time, notwithstanding sections 1763–1765, R. S.; and implied very clearly, on the other hand, that where an officer performs added duties under his appointment to a single place, as by direction of the head of his Department, the statute then provides that he shall receive no additional compensation for that class of duties unless it is so provided by special legislation.

Nor is there any incompatibility between the office of a general appraiser and the special service in this case, a point touched upon as to two military commissions, in 22 Opin., 237. There are many precedents for such special service by officers of the Government, some of which were indicated by Mr. Griggs in 22 Opin., 184, above cited. There are also recent precedents of which you know.

I agree with former Secretary Gage in thinking that the provision in section 12 of the customs administrative act,

forbidding general appraisers to be engaged in any other business, avocation, or employment, is not applicable to this case. That language means, of course, that general appraisers shall give their whole time to their public duties, and shall not be engaged in any private occupation; and it means, in connection with other provisions of the law, that they can not hold another *office* under the Government or be engaged in other incompatible Government service. But I do not think it means that a general appraiser, specially qualified for the important public service presented in this case, is not permitted to perform that service. It is to be assumed, if the exigencies of the customs branch of the public business required at this particular juncture Mr. Sharrett's unremitting attendance upon the duties of the Board of General Appraisers that the Secretary of the Treasury would not have employed him or detailed him upon this extraordinary mission.

I have the honor to advise you, therefore, that in my opinion Mr. Sharrett's present employment is not repugnant to his character as a member of the Board of General Appraisers, and is not contrary to law. The principle of republican institutions which is opposed to "duplicate offices" is not applicable to the present case.

Very respectfully,

P. C. KNOX.

The PRESIDENT.

---

#### NEUTRALITY—MILITARY SUPPLIES—HORSES.

A general statement of the law to be applied in the matter of the shipment of horses from New Orleans to South Africa, for military purposes, and the alleged establishment of foreign agencies in the United States for the purchase and shipment of hostile supplies (horses and mules) for use against a third party:

According to the weight of authority, the sale of contraband or war supplies to a belligerent is not unlawful, or a thing which a neutral nation must forbid to its citizens.

A neutral nation must not give aid to one of the belligerents in the carrying on of war; but the carrying on of commerce with the belligerent nations in the manner usual before the war, is not in itself the giving of such aid.

The mere increased demand for warlike articles, and their consequent increased quantity in the commerce between the neutral and the belligerent countries, does not of itself make the commerce cease to be the same that was usual before the war.

A belligerent may seize at sea merchandise involved in such commerce when it is the property of his enemy, or when it is composed of articles for direct and immediate use for warlike purposes.

The fact that neutral individuals, instead of their government, give aid to the belligerent, does not relieve the neutral government from guilt; but the government is innocent if the acts of individuals are such as, from their nature, make it impracticable or excessively burdensome for the government to watch and prevent, or, if preventable without excessive burden, the government uses due diligence about their prevention.

The fact that neutral merchants give aid to belligerents purely from motives of gain-seeking does not relieve their government from its obligation to prevent such aid being given.

In determining whether a series of transactions which, in one aspect are commercial in character, are prohibited to the neutral nation and its people as being an aid to one of the belligerents in carrying on war against the other, the criteria are practically impossible to specify in advance. Among the points by which to be guided in determining that question are the systematic character of the transactions, their greater or less extensiveness, their persistence in time, their governmental character or the absence of it, their objects and results, and, principally, their relation, if any, to the prosecution of the war being carried on by the belligerent.

DEPARTMENT OF JUSTICE,

*April 4, 1902.*

SIR: I have the honor to acknowledge the receipt of two communications from you, one of the 29th ultimo and the other of the 2d instant, concerning the shipment of horses from New Orleans to South Africa, and the alleged establishment in the United States of foreign agencies for the purchase and shipment of hostile supplies (horses and mules) for use against a third party. Each letter contains numerous inclosures relating to those subjects, including a letter from the governor of Louisiana and one from Messrs. Wessels and Wolmarans.

You ask for appropriate advice and in the later communication for a brief memorandum of my opinion upon the questions raised by the governor's letter.

The governor, while reciting a number of alleged facts concerning the transactions referred to, and among others

the arrival and action at New Orleans of Gen. Sir Richard Campbell Stewart and aids, of the British army, reported to be on a tour of inspection of the transport and mule shipment service at Southport and Chalmette, near New Orleans, asks your views as to the powers and duties of the State governments in matters of this character. He also sends copies of correspondence between his office and the mayor of New Orleans and sheriff of St. Bernard Parish, growing out of the suggestion in a letter from Samuel Pearson, described as a burgher of the South African Republic, that he be permitted to use force against the British officers said to be carrying on war at Chalmette.

It seems necessary to say nothing as to the duties and powers of the State of Louisiana, except that they involve, of course, the exercise of the usual civil means of preserving the peace, in the improbable event of its breach in the manner supposed to be suggested by Pearson. I can not believe that the latter contemplates taking the law into his own hands, in defiance of the State and Federal governments; nor does he threaten to act without the President's permission, which, it is needless to say, he will not receive. Nor can I believe that he expects any such permission. His object is doubtless to bring forcibly to the attention of the Government that he considers the proceedings of the British equivalent to "carrying on war" upon our territory.

The principal question raised by your communications seems to be whether the transactions concerning the horses and mules involve a departure, on the part of our Government, from the duties of neutrality with regard to the war which has so long devastated a portion of South Africa; a delicate question in view of the interests of our citizens engaged in selling and otherwise dealing with the animals, and of our foreign relations.

Notwithstanding the urgency of Samuel Pearson and of the governor of Louisiana, I think this Government should not take any action without mature consideration by the President and his advisers. In order to initiate the disposition of the business in that way, I submit the following tentative suggestions:

The sale of contraband or war supplies to a belligerent is held by many eminent authorities on international law to be unlawful and something which a neutral nation must forbid to its citizens. But the weight of authority is the other way.

One of the rules of international law which seems to be now fully agreed upon is that a neutral nation shall not give aid to one of the belligerents in the carrying on of the war. Carrying on commerce with the belligerent nation in the manner usual before the war is likewise agreed not to be in itself giving such aid. It is also settled that the belligerent may seize at sea merchandise involved in such commerce when it is the property of his enemy, or when it is composed of articles of direct and immediate use for warlike purposes. It also seems to be agreed that the mere increased demand for warlike articles and their consequent increased quantity in the commerce between the neutral and the belligerent countries, does not of itself make the commerce cease to be the same that was usual before the war. It does not seem to be settled that the mere fact that the belligerent government is the purchaser of such warlike articles of itself makes the neutral government's permission of the commerce a departure from the obligation to give no aid to the belligerent in the carrying on of the war. It seems, on the other hand, to be settled that the fact that neutral *individuals* instead of their government give aid to the belligerent does not relieve the neutral government from guilt; but the government is innocent if the acts of individuals are, from their nature such, as to be impracticable or excessively burdensome for the government to watch and prevent, or, if preventable in their nature without such excessive burden, the government uses due diligence about the prevention of them. It also seems to be settled that the fact that neutral merchants give aid to the belligerents purely from *motives of gain-seeking* does not relieve their government from its obligation to prevent. If this were otherwise, the supplying the ships of war with coal sufficient to enable them to carry on their warfare would be, in nearly all cases, lawful to permit, and even the supplying them with cannon and powder.

These things being premised, there remains the difficulty of drawing the line which divides the right of carrying on, and of governmental permission to carry on, the commerce usual before the war, and the obligation upon the government and citizens of the neutral country to give no aid to the belligerents in the prosecution of the war.

Each new case that arises seems to present new difficulties, and because it is new the nation interested in carrying on the commerce argues from that part of international law which is based upon express treaties and distinct precedents, and affirms that it can not be shown by the actual practice of nations and by treaties that all nations have recognized that such a transaction as is in question is prohibited by the common consent of nations. The other interested nation, on the other hand, usually dwells upon that part of the law of nations which has been developed by famous text writers into a system of principles, and argues that general principles are violated by the transaction. One nation brings forward all that can be shown in favor of the freedom of commerce; the other all that can be shown in favor of belligerent right and neutral duty. But in international law, as in municipal, cases must be decided for which no exact precedents can be found. It is impossible to do nothing. Where there is nothing else to determine whether a thing belongs to one class or another, as whether it belongs to State or interstate commerce, or whether it is an ore of lead or an ore of silver, and it must be classed one way or the other to accomplish justice, it is a familiar principle to permit the preponderant characteristics to control the determination. This principle seems to have been recognized in international law. Thus, Hall [Int. Law], speaking of the Confederate cruiser *Shenandoah* having entered Melbourne in need of repairs, provisions, and coal, and obtaining her supplies, and a surreptitious addition to her crew, says that "it was urged on the part of the government of that country" (the United States) that "the main operation of the naval warfare" of the *Shenandoah* having been accomplished by means of the coaling "and other re-fitment" at that port, Melbourne had been converted into her base of operations.

Hall continues (page 628):

"The argument was unsound because continued use is above all things the crucial test of a base, both as a matter of fact, and as fixing a neutral with responsibility for acts in themselves innocent or ambiguous. A neutral has no right to infer evil intent from a single innocent act performed by a belligerent armed force; but if he finds that it is repeated several times, and that it has always prepared the way for warlike operations, he may fairly be expected to assume that a like consequence is intended in all cases to follow, and he ought therefore to prevent its being done within his territory. If a belligerent vessel, belonging to a nation having no colonies, carries on hostilities in the Pacific by provisioning in a neutral port, and by returning again and again to it, or to other similar ports, without ever revisiting her own, the neutral country practically becomes the seat of magazines of stores, which though not warlike are necessary to the prolongation of the hostilities waged by the vessel. She obtains as solid an advantage as Russia in a war with France would derive from being allowed to march her troops across Germany. She is enabled to reach her enemy at a spot which would otherwise be unattainable."

In the latter case there is merely a purchase of food in a neutral port, in one view of the matter, and that would be a purely commercial transaction; but the mere repetition of the transaction, and the dependence of the belligerent's vessel upon such transactions to enable her to remain on the seas with a view to carrying on hostilities there, causes the aid given to the belligerent power to overweigh the mere commercial business of selling food to a visiting purchaser. So, where a large quantity of guns was sold during the Franco-Prussian war by the Government of the United States in the open market at New York, and agents of the French Empire became the purchasers, upon complaint being made by the opposing belligerent, President Grant put a stop to the sales, notwithstanding the purely commercial design with which the sales were being made, the assistance to France in her warfare overweighing the commercial elements of the business.

During the same war, the German Government com-

plained that a considerable number of British ships had been hired in Newcastle for the conveyance of coal to the French fleet operating on the North Sea. In the correspondence between the British representative at Berlin and his own Government, the British representative, while denying the justice of other German complaints, said on the subject of the coal:

“With reference to these questions, I have had several conversations with Baron Thile and M. Delbruck. On the subject of coal, I have stated that we could not prohibit the exportation of an article which was destined for other than war purposes, and the exportation of which, I believed, we had taken an engagement in our commercial treaty with France not to prohibit. The chartering of English vessels for the express purpose of provisioning the French fleet, and the delivery of the coals direct from those vessels on board French men-of-war in hostile naval operations against Prussia, is undoubtedly a contravention of the neutrality which we are bound to observe between the belligerent parties.”

The British Government forbade the sending of the coal. And on that subject Bluntschli, section 805, remarks:

“The neutral state may without hesitation accord to vessels of war the taking on board in its ports of coal necessary to enable them to reach another neighboring port, but it is with reason that the British Government, during the French-German war, prohibited the sending to the French fleet on the North Sea coal taken from English ports. The intent to aid one of the belligerents was evident.”

Thus, also, in discussing the famous second rule of the treaty of Washington which prohibited the use of neutral ports for obtaining a renewal or augmentation of military supplies, Count Sclopis, one of the arbitrators under that treaty, says that England and the United States equally hold “that it is not a violation of the laws of nations to furnish arms to the belligerent,” and then he adds (Whart. Int. Law Dig., vol. 3, sec. 370):

“But if an excessive supply of coal is connected with the other circumstances which show that it was used as a veritable *res hostilis*, then there is an infraction of the second



article of the treaty. \* \* \* Thus, for example, when I see the *Florida* and the *Shenandoah* choose for their fields of action, the one the stretch of sea between the Bahama Archipelago and Bermuda, to cruise there at its ease, and the other Melbourne and Hobson's Bay, for the purpose, immediately carried out, of going to the Arctic seas, there to attack the whaling vessels, I can but regard the supplies of coal in quantities sufficient for such services infraction of the second rule of Article VI."

And further, Secretary of State Bayard, writing under date of June 1, 1885, to Mr. Smithers, says (Whart. Digest, vol. 3, sec. 369):

"Even supposing such articles to be contraband of war and consequently liable to be seized and confiscated by the offended belligerent, it is no breach of neutrality for a neutral to forward them to such belligerent ports, subject, of course, to such risks. When, however, such articles are forwarded directly to vessels of war in belligerent service, another question arises. Provision and munitions of war sent to belligerent cruisers are unquestionably contraband of war. Whether, however, it is a breach of neutrality by the law of nations to forward them directly to belligerent cruisers depends so much upon extraneous circumstances that the question can only be properly decided when these circumstances are presented in detail."

Calvo, section 2749, says that Great Britain, while refusing to interdict the exportation of coal in 1870, declared that—

"The shipments of coal leaving her territory ought to be directly to the ports of the enemy or neutral ports, by merchant ships and not by military transports, and that they could not serve to renew on the high seas the supplies of fleets or of belligerent cruisers."

Wharton, author of the International Law Digest, says (vol. 3, sec. 398):

"Nor is it a breach of neutrality for a neutral state to permit the sale of coal to any extent to a belligerent. It would, however, be a breach of neutrality for a neutral to permit a permanent depot or magazine to be opened on its shores, on which a particular belligerent could depend for

constant supplies. To require a neutral to shut up its ports so as to exclude from coaling all belligerents, would expose a nation with ports as numerous as those of the United States to an expense as great as would be imposed by actual belligerency. It is on the belligerent, who goes to war, not on the neutral, who desires to keep out of it, that should be thrown expenses so enormous, and constitutional strains so severe as those thus required. On the other hand, the breaking up of central depots or magazines for the constant supply of particular belligerents would be within easy range of ordinary national police."

Hall, after stating the principle that a neutral state can not allow its territory to become a scene of hostilities, and advertng to the extension of this principle concerning acts of hostilities having their commencement on neutral ground, and after giving examples of using neutral territory, including those in the above quotation, says (p. 629):

"That previously to the American civil war neutral states were not affected by liability for acts done by a belligerent to a further point than that above indicated, there can be no question; but there is equally little question that *opinion has moved onwards* since that time and the law can hardly be said to have remained in its then state. Even during the American civil war ships of war were only permitted to be furnished with so much coal in English ports as might be sufficient to take them to the nearest port of their own country, and were not allowed to receive a second supply in the same or any other port, without special permission, until after the expiration of three months from the date of receiving such coal. The regulations of the United States in 1870 were similar; no second supply being permitted for three months unless the vessel requesting it had put into a European port in the interval. There can be little doubt that no neutral states now venture to fall below this measure of care; and there can be as little doubt that their conduct will be as right as it will be prudent. When vessels were at the mercy of the winds it was not possible to measure with accuracy the supplies which might be furnished to them, and as blockades were seldom continuously effective, and the nations which carried on distant naval operations

were all provided with colonies, questions could hardly spring from the use of foreign possessions as a source of supplies. Under the altered conditions of warfare matters are changed. When supplies can be meted out in accordance with the necessities of the case, to permit more to be obtained than can, in a reasonably liberal sense of the word, be called necessary for reaching a place of safety, is to provide the belligerent with means of aggressive actions; and consequently to violate the essential principles of neutrality."

While discussions of such matters have, as in the *Alabama* claims cases, principally concerned war vessels and expeditions by sea, it can not be doubted that aid given to an army engaged in actual warfare stands upon the same footing as aid given to a fleet so engaged, since both equally involve a taking part by the neutral in furthering the military operations of the belligerent. Nor should the municipal laws of England and the United States, or of other countries, by principally dealing with such vessels and expeditions, obscure the fact that aid can as well be given to military operations of the belligerent the one way as the other, by proceedings carried on upon the neutral territory.

From all that has been said, I think that it may be concluded that, in determining whether a transaction of the kind referred to, which in one aspect is commercial in character, is yet not entitled to enjoy the rights belonging to commerce, but is prohibited to the neutral nation and its people as being an aid to one of the belligerents in carrying on war against the other, the criteria are practically impossible to specify and enumerate in advance. Each case that arises must be considered in all its circumstances and determined accordingly.

In the case before us there is no statement of facts by you upon which to give an official opinion as to the law, and I do not understand that one has been requested. A number of allegations and some testimony have been sent me, and they are sufficient to challenge attention. But the first thing to be done is to ascertain whether the allegations are true. I have endeavored, as well as I could in advance, to indicate the law to be applied to them, and shall only add that, among the points by which to be guided, are the sys-

tematic character of the transactions, their greater or less extensiveness, their persistence in time, or the reverse, their governmental character or the absence of it, their objects and results, and principally, of course, their relations, if any, with the prosecution of the military operations in South Africa.

Very respectfully,

P. C. KNOX.

The SECRETARY OF STATE.

---

MILITARY SUPPLIES—ARMS—CHINA.

The mere shipment or exportation of arms, in the way of commerce, to a country in which there are insurrectionary movements, does not seem to be prohibited by the statutes of the United States or by the law of nations.

DEPARTMENT OF JUSTICE,

*April 11, 1902.*

SIR: I have your favor of the 28th ultimo, in relation to the importation of arms and material, used exclusively for the manufacturing of arms and ammunition, into China.

You set forth that a preliminary protocol between China and the powers maintaining intercourse with that Empire, provided (among other stipulations for the adjustment of the questions arising out of the attacks upon foreigners and the injury to foreign interests in China) that provision should be made for the maintenance, under conditions to be settled between the powers, of the prohibition of the importation of arms, etc.

You say that previous to the signing of the final protocol under date of September 7, 1901, there was much discussion in the conference of the powers relating to the conditions to be settled between them for this prohibition, and that several of them undertook to prevent the exportation of the arms from their jurisdictions; that it was explained that any steps taken in this country would have to be subject to existing or future laws; and that in the final protocol, it is stated that China agreed to prohibit the importation of arms, etc. And you add:

“The representatives of several of the powers have called

my attention to the situation created in China by the insurrectionary movements now flagrant in the southern provinces and to the fact that the insurgents are deriving supplies of arms and warlike material from abroad; and they urge that the measures which they are taking to prevent the exportation of such supplies from their territories to China should be seconded as far as possible by similar action on the part of the United States.

"I have the honor to bring this matter to your notice with the request that the officials of your Department may be instructed to do whatever may be practicable under existing laws in the way of restricting the exportation of arms and warlike materials to China for use against a nation with which the United States are at peace and to the injury of foreigners (including citizens of the United States) found in China. I should be glad if you would communicate to me your views on the subject in order that I may inform the foreign representatives of what is or can be done in the premises."

Since receiving your communication, I have sent you one concerning shipments of mules and horses to South Africa, and I refer you to that as throwing some light upon the present matter.

The mere shipment or exportation of arms, in the way of commerce, to a country in which there are insurrectionary movements, does not seem to be prohibited by our statutes, or by the law of nations; and for this reason there appears to be nothing which this Department can do in the direction of restricting the exportation of arms and warlike material to China.

This question was passed upon by the Attorney-General (21 Opin., 267) in connection with the insurrection in Cuba.

The only thing practicable, if it is deemed necessary to prevent such exportation to China, would seem to be to suggest Congressional action.

Respectfully,

P. C. KNOX.

The SECRETARY OF STATE.

**PHILIPPINE ISLANDS—AMERICAN VESSEL—ENTRY—MANIFEST.**

An American vessel in ballast, arriving in March or April, 1902, at Port Townsend, Wash., from Manila, did not arrive from a foreign port and was not engaged in the coasting trade within the meaning of the laws requiring the making of entry and the sending of a copy of the manifest to the Auditor.

Sections 4351, 4352, 4353, 2806, 2811, 2774, 2823, 2824, etc., of the Revised Statutes considered with reference to such a vessel and voyage.

**DEPARTMENT OF JUSTICE,**

*April 23, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 11th instant inclosing a communication from the collector of customs at Port Townsend, Wash., in which he reports the arrival there of the American schooner *Endeavor* from Manila, P. I., in ballast, and that the master was required to make entry of the vessel as from a foreign port and requested to mail a copy of his manifest to the Auditor, but that no entrance or survey fees were collected.

You ask for an opinion regarding the matter.

The Revised Statutes provide the officers to collect all the revenue and give you the direction of them.

The Philippine tariff act fixes rates of duty on goods coming from the Philippines, and authorizes their collection and the collection of a tonnage tax on foreign vessels coming from the Philippine ports. It might have provided that all the specific provisions of existing laws enacted with a view to the convenient collection and protection of the revenue, in the case of vessels arriving from foreign ports, should be applicable to and obligatory upon vessels arriving from the ports of that archipelago, or it might have provided that the specific provisions of law applicable to vessels licensed for carrying on the coasting trade (e. g., Rev. Stat. 4351, 4352, 4353) should be applicable.

It did not do so, and these ports not being foreign ports, as the Supreme Court had theretofore decided, and the vessels not those licensed for the coasting trade, those specific provisions can not be made applicable by you.

Such regulation by you as may be indispensable to collecting the revenue, if the act of June 10, 1890, expressly

made applicable, does not sufficiently provide for that, is within the intent of the Philippine tariff act, because it directs the collection to take place. But if Congress thought, expected, or intended that the statutes referred to would or should apply, as laws, with the same force as the statutes it expressly declared applicable, it used no language which expresses or implies that they should, and Congress can legislate in no other way. In construction, the question is not what the legislature thought, but what the words of the law express or imply. If there is an omission of what would be wise or convenient to have in the statute, only the legislature can supply it.

The *Endeavor* was not from a foreign port (Rev. Stat. 2806, 2811, 2774, 2823, 2824, etc.). A vessel from such a port, or one licensed for and engaged in the coasting trade, would be required by Rev. Stat. 2806, or by Rev. Stat. 4350-53, to have on board a manifest.

The vessel here in question not being such a vessel or a vessel from such a port, or even laden with merchandise (Rev. Stat. 2811), the laws applicable in such cases do not, in my opinion, bind it.

Respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

---

#### CUSTOMS LAW—FREE ENTRY—PHILOSOPHICAL OR SCIENTIFIC APPARATUS.

An instrument designed for the reproduction of artists' models, statuary, and decorative architecture, imported for the purpose of being temporarily exhibited as a philosophical or scientific apparatus for the promotion of industry in the United States, and to be exported within six months after its importation, may fairly be regarded as a "philosophical or scientific apparatus" within the meaning of paragraph 701 of the tariff act of July 24, 1897 (30 Stat., 203), and is entitled to be admitted free of duty.

DEPARTMENT OF JUSTICE,

*April 30, 1902.*

SIR: Your letter of April 22 informs me that application has been made to you for the admission under section 701 of the tariff act of 1897 of an instrument designed for the

reproduction of artists' models, statuary, and decorative architecture; that the applicant proposes to exhibit this instrument as a philosophical or scientific apparatus, for temporary use, for the promotion of industry in the United States, and tenders a bond for the payment to the United States of such duties as may be imposed by law thereon, unless exported within six months after such importation. Under these facts you request my opinion on the question whether such a machine is a philosophical or scientific apparatus within the meaning of the statute.

The section of the law mentioned provides that—

“Works of art, drawings, engravings, photographic pictures, and philosophical and scientific apparatus brought by professional artists, lecturers, or scientists arriving from abroad for use by them temporarily for exhibition and in illustration, promotion, and encouragement of art, science, or industry in the United States, and not for sale, shall be admitted free of duty, under such regulations as the Secretary of the Treasury shall prescribe;”

upon giving bond for the payment of the duty if not exported within six months after importation, or within an extension for the further term of six months if the Secretary of the Treasury in his discretion grants an application for the extended term.

It is apparent that this law is liberal in its purpose and intention. I do not mean by this that it is necessarily to be construed liberally so as to embrace doubtful cases not fairly within its terms, but only that in view of the temporary use in a special way, and in recognition of the advantages of development in art, science, and industry, the spirit and tendency are liberal. It is also apparent that the revenue interests of the United States are protected from imposition by the limited nature of the free-entry privilege, by the power of the Secretary to regulate, and by the bond to export or pay the duties.

G. A. 4886 held that various instruments, utensils, and apparatus were entitled to be called scientific or philosophical within the meaning of an earlier law corresponding to paragraph 638 of the act of 1897. Under that paragraph an importation of this nature is absolutely free; that is, it is



not subject to exportation or payment of duties. A similar aid to development of the higher human faculties there appears as a concession to institutions, importing for their own use and not for sale, incorporated, established, or maintained for religious, philosophical, educational, scientific, literary, or artistic purposes.

Again, in G. A. 4918, the board held that under that law certain other instruments or devices for demonstrating scientific truths were entitled to free entry; and in G. A. 5040 a model for the use of a medical school was admitted under the same law. (But see G. A. 4717, in which dutiability was sustained because the institution itself was not brought within the categories of paragraph 638.)

These decisions evidently take note of the claims which may be advanced in all this field on behalf of liberal *learning* or of *artistic* or *scientific* development. It seems natural to suppose that Congress in paragraph 701 saw an analogous claim, when an *industrial* development might be dependent upon a development or *application* of science. In these decisions the board considered various opinions of the courts, all of them relating to laws antecedent and corresponding to section 638, some of them to such laws when the word "philosophical" alone was used, and others to later laws wherein the word "scientific" was joined to "philosophical." The principles established are, in general, that philosophical apparatus and instruments are such as are ordinarily used for making observations, discoveries, and experiments in relation to nature and natural forces (*Robertson v. Oelschlaeger*, 137 U. S., 436); that the word "scientific" when added to the law enlarged the class of instruments exempted, and refers to intrinsic character and not to the nature of the use for which designed or employed. (*United States v. Presbyterian Hospital*, 71 Fed. Rep., 866; *In re Massachusetts General Hospital*, 95 Fed. Rep. 973.)

In the latter case the court, discussing the apparent inconsistency between the test of principal use indicated in *Robertson v. Oelschlaeger*, and intrinsic character announced in the case of the *Presbyterian Hospital*, held that the rule of the former case is not to be so strictly applied as to exclude from the exempted classification when used in the

ordinary practice of a scientific profession; that while the use of philosophical instruments may be limited to observations, experiments, and discoveries, the use of scientific instruments, from the nature of the subject to which they relate, may extend to other purposes; that surgical instruments are scientific instruments until it is shown that their principal use is in the trades and arts. On appeal the exemption was sustained (*United States v. Massachusetts General Hospital*, 100 Fed. Rep., 932), the court remarking that neither the rule of principal use nor of intrinsic character is an infallible guide, while both are of great aid in reaching proper conclusions. An exact definition is not attempted, the court pointing out the vagueness of the term "scientific instruments," the propriety of liberal construction on behalf of an exemption having in view the highest interests of the public, and concluding (p. 937): "We must look at the general purpose of the statute, and to the rule frequently stated, but not often applied, that in cases of doubt the doubt must be resolved in favor of the importer."

I have dwelt on these decisions respecting another section of the law in order to show the general doctrine in cognate cases—the difficulty of laying down a final and satisfactory rule, the shifting tests, in different cases, of principal use and intrinsic character; the propriety of liberal interpretation, and the guide by which a practical use in trades beyond the region of education, art, or scientific demonstration closes the door to exemption. The authorities imply, perhaps with some doubt, that what is or what is not an article entitled to exemption is to be determined as a question of fact. This view (see G. A. 5040) and the doubt are both expressed in the *Presbyterian Hospital* case. Under the aspect either of use or character, the nature of the subject seems to present a question of fact, or at least a question depending upon various considerations of fact respecting the thing, as well as upon the terms of the law.

While the courts, in the peculiar customs jurisdiction, review (sec. 15, customs administrative act) the facts as well as the law, although ordinarily not disposed to disturb the finding of the Board of General Appraisers as to the facts (*In re Van Blankensteyn*, 56 Fed. Rep., 474; *Marine v.*

*Lyon*, 65 id., 992; *White v. United States*, 72 id., 251; *Apgar v. United States*, 78 id., 332), the statutes and established rules under which the Attorney-General renders opinions do not permit him to pass upon a question of fact (18 Opin., 487; 20 Opin., 253, 384, 459; 21 Opin., 174, 240, 454) or a mixed question of fact and law (19 Opin., 672; 20 Opin., 524; 22 Opin., 342). It would be necessary, then, for me to decline to answer your question on this ground, if I did not understand that your brief statement of facts in itself contains the correct answer to the question in its doubtful or dual aspect as one of fact and law.

Recurring, then, to paragraph 701, and seeking to apply, as advice to you rather than a formal and strict opinion, the just inferences from the doctrines on a related law set forth, *supra*, I note that the situation as to use here withdraws an embarrassment found in considering the other law, for the use is recognized by the statute itself as temporary and in illustration or promotion of art, science, and industry. Thus the applied use in practical trades or industry is not now involved, although the statute contemplates that ultimate result, to which, however, the exemption would not extend. The restricted use thus helps out, so to speak, because of its demonstrating, illustrating, or experimental character, the liberal and beneficial purpose of the law. I say beneficial, because while this exemption may not have in view the "highest interests of the public," as the court thought of the exemption in the *Massachusetts General Hospital* case (100 Fed. Rep., 932), the intention of Congress clearly regards the interests of the public when it seeks thus to promote arts, science, and industry in the United States.

Your letter states or implies that the article here is an instrument or an apparatus; that the design contemplates the encouragement of art. It seems further, that while this instrument or apparatus is probably a machine patented or entitled to patent abroad and in this country, it invokes and applies philosophy or scientific principles in hydraulics, pneumatics, or electricity, and constitutes a novel development of the laws of mechanical forces. Your letter also seems to attribute to the applicant the character of an exhibitor, who, as lecturer or scientist, will demonstrate

its nature and use in promoting industry; the use is to be temporary, the apparatus is not for sale, and a bond under the law, with proper condition, has been tendered. An apparatus so described may reasonably be said to promote and encourage in combination all three objects of the care of Congress, namely, art, science and industry. But while it appears to me in accordance with the views of the courts, *supra*, that so far as the case is doubtful, doubt should be resolved in behalf of the importer, and I therefore have the honor to advise you that such a machine may fairly be regarded as a philosophical or scientific apparatus within the meaning of paragraph 701, I desire to recur to the aspects of this question which characterize it as one of fact rather than of law, and one for you, therefore, to decide under your discretion and authority rather than for me. So far, then, as you may not yourself have concluded that in point of fact this instrument or machine is a philosophical or scientific apparatus within the meaning of this statute, you must yourself complete your function and finally pass upon that question. My advice to you on the legal side of the matter—given, indeed, with some hesitation, because the elements of fact and law are closely interwoven—is based on the understanding that on the whole, in view of the principles involved, the intrinsic character and the temporary use for the statutory purpose, you know of no consideration of fact which would prevent the apparatus from being classed as a philosophical or scientific apparatus.

I have the honor to add, also, that the vagueness of these terms, and the difficulty of laying down an infallible rule on the subject, pointed out by the courts, leads me to emphasize the view that any conclusion reached upon one case is not to be extended, because of general expressions used, to any other similar case which may arise. The similarity may be very indefinite and general, and the principle which I have just stated is well established and is specially applicable to the present circumstances.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

19219—03—3

LIQUIDATION OF DUTIES—REFUND—MISTAKE OF FACT.

Where, notwithstanding the instruction of the Secretary of the Treasury that collectors of customs should delay final liquidation of duties on certain merchandise until further orders, duties were nevertheless liquidated and subsequently reliquidated, *Held*: Such original liquidation was complete and subsisting until changed by reliquidation.

The authority of the Secretary of the Treasury to refund duties erroneously collected, on the ground of mistake, is to be restricted to mistake of fact.

The question whether another country pays a bounty on the exportation of sugar can not properly be called a pure question of fact. It is a question of mixed fact and law.

A mistake in such a question does not arise upon an error of fact within the meaning of the concluding proviso to section 1 of the act of March 3, 1875 (18 Stat., 469), defined in 21 Opin., 224, to be a common-law mistake of fact.

DEPARTMENT OF JUSTICE,

*May 9, 1902.*

SIR: Your letter of February 12 submits the following situation:

The tariff act of 1894 provided (paragraph 1824) that in addition to an ad valorem duty importations of sugar from a foreign country paying a direct or indirect bounty on export should pay also a countervailing specific duty subject to relief under certain conditions.

T. D. 15209, dated August 31, 1894, declared that indirect bounties may apparently be earned by exporters of sugar from France; countervailing or additional duty was assessed accordingly, and T. D. 15541 regulated relief in accordance with the statute. On April 5, 1897 (T. D. 17978), the Secretary of the Treasury, under his power to direct the superintendence of the collection of import duties, etc., "as he shall judge best" (Rev. Stat., 249), instructed collectors to delay until further orders final liquidation of entries of any merchandise arriving after April 1, 1897; but this order was not to be applied to entries made after April 1 of merchandise which was purchased and directed to be shipped before that date. This circular order was revoked July 21, 1897 (T. D. 18198). On May 10, 1897 (T. D. 18036), the Treasury announced that under a law of France, which took effect April 7, 1897, a bounty was paid on the exportation of sugar,

but does not appear to have changed its view of the previous French *régime* or its practice in assessing countervailing duty accordingly.

The Franklin Sugar Refining Company of Philadelphia made two importations of sugar, one of which was cleared from France April 1, and entered at Philadelphia April 24; and the other was cleared from France April 6, and entered at Philadelphia April 27. The first entry was liquidated June 13, under the circular of April 5, and assessed with the additional duty. On July 7 this entry was "reliquidated" or amended on the Government's own motion to correct an error in price or valuation by adding a certain cash discount. The other entry was liquidated July 13 and assessed in the same way. Against these liquidations the importers protested on the single ground that the discount should not have been added to make price or value. The collector claims that the entries at this stage were finally or in reality liquidated, and so treated in accordance with the regulations, and that withdrawals took place on this theory. Final action was not taken on the importers' protest for over a year. In the meantime, on October 30, 1897, the Board of General Appraisers (G. A., 4029) referred to G. A., 1884 (December, 1892), holding that while France then gave a bounty on the manufacture of sugar, there was none paid on its export, and determined that under the French law of April 7, 1897, "a bounty is now paid on sugar exported from France or her colonies," and that sugars exported prior to the taking effect of this law are *not* liable to additional duty under the act of 1894. The Treasury took no appeal on the latter ruling, but appears to have accepted it only as to that particular case and not as conclusive on the whole situation prior to April 7, 1897.

On November 5, 1897, the importers filed notices with the collector claiming a mutual mistake of fact. On July 21 and August 15, 1898, respectively, the entries were *reliquidated* on the protests of the previous July, and the claim that the cash discount was improperly included was sustained and refunds made accordingly. Thereupon the importers protested against the reliquidation, claiming that no export bounty was paid by France.

Upon this situation you present to me the following questions for my opinion:

1. Were the original liquidations complete and subsisting liquidations until changed by reliquidation?

2. Did the assessment of countervailing duty by the collector and the payment of same by the importer arise upon an error of fact within the meaning of the concluding proviso to section 1 of the act of March 3, 1875, defined to be (21 Opin., 224) a common law mutual mistake of fact?

3. If you [I] hold the original liquidation to have been complete, and that a mutual mistake of fact is involved, are the reliquidations final and conclusive under section 21 of the act of June 22, 1874?

It is to be observed that in G. A., 4032 (November 10, 1897), the Board held that certain liquidations under the circular order were provisional and did not constitute final decisions of the collector. But this was the necessary inference from the fact that the collector regarded those liquidations as merely tentative and never promulgated them.

The question of the finality of the original liquidations here is close. It seems clear that this merchandise should not have been included under the Secretary's order, but it was included. The terms of the order are positive that liquidations shall not be final. Nevertheless, in view of the actual steps taken by the collector and the importers, distinguishing this case from that considered in G. A., 4032, I am of the opinion on the whole that the answer to your first question must be in the affirmative. I am influenced in this view by the strict rules respecting liquidation and the right and duty of protest, and by the facts that importers are charged with knowledge on these points, that under the Treasury view excision here becomes a question of fact, or of law, or of mixed fact and law.

It might be suggested that if the existence of a foreign bounty, in view of the foreign law and our own, is a question of fact, the courts which have passed upon other phases of the foreign bounty situation would not have had jurisdiction, on the theory that the Board of General Appraisers settle conclusively all findings of fact. But while appellate

courts will not under many circumstances review findings of fact by the courts below, and while in general findings of fact by the Board of General Appraisers will not be disturbed on review in the courts, the jurisdiction conferred by the customs administrative act is special, and plainly provides that the board shall examine and decide the case submitted (which must be held to mean a decision on the law as well as on the facts), and that the courts shall review the questions of law and fact involved (secs. 14, 15, customs administrative act). So that the question does not become a question of law merely because the courts are empowered to pass upon it.

In the *Downs Case* (113 Fed. Rep., 144), considering the *Russian Sugar Law* in the light of section 5 of the act of 1897, it appears that the Secretary of the Treasury, not insisting that his determination under that law was exclusive as a settlement of facts, voluntarily committed to the board the query whether Russia paid a bounty, saying that: "While the question in its initiative lies in the administration of the Treasury Department, the question is of a judicial rather than of an administrative character, and its importance demands determination by a judicial tribunal."

The board indicated the dual nature of the question, referring to the Secretary's preliminary finding of a bounty and its amount as a decision "as to this particular *fact* \* \* \* whether the laws of Russia do *in fact* bestow such a bounty," and, on the other hand, as involving "the *construction* of the laws of Russia." The circuit court of appeals held that the question whether a country pays a bounty, where it depends upon the construction of the laws of the country, is a judicial one. This was not necessarily to decide that it was not a question of fact, but only that in view of the importance of the question from many standpoints and of the peculiar jurisdiction of the board and the courts as to fact and law in customs cases, the Secretary's primary decision is reviewable. The court also held "that the Government of Russia does secure to the exporter \* \* \* a money reward \* \* \* whenever he exports sugar from Russia."

Again, in the case of *Hills Bros. Company* (107 Fed. Rep., 107) the court construed the *Dutch* law, and held that the



Netherlands Government, in practical effect, paid a bounty upon exportation. In the ultimate analysis are such findings the determination of a mere question of fact?

The act of March 3, 1875 (18 Stat., 469), is restrictive of previous liberality rather than remedial. The second proviso now involved requires for the allowance of refund, based upon the correction of errors in liquidation, whether for or against the Government, that such error shall arise "*solely* upon errors of fact discovered within one year from the date of payment, and, when in favor of the Government, brought to the notice of the collector within ten days from the date of discovery." Timely notice was given in this case. In 21 Opin., 224, the phrase "errors of fact" in this law is defined to refer to "mistakes of fact in the meaning of the common law—that is, to mutual mistakes of fact." The mistake here, whatever its character, was mutual. This opinion was affirmed in 21 Opin., 251, which notices the restrictions rather than the enabling character of the act. These opinions presuppose the propriety of strict construction of such laws granting dispensing power to the Secretary of the Treasury. The authority to refund moneys covered into the public treasury must always clearly appear. Concurring in the reasons and conclusions of these opinions, I see no ground in the present case for qualifying the rules laid down.

The conception of a "common-law mistake of fact" appears to have been drawn from the doctrine of the law of contracts, which held that in order to authorize relief in equity there must be mutual mistake of fact. The corresponding doctrine is that there could be no relief either in equity or law for a mistake of law, founded on the maxim that ignorance of law will not furnish an excuse. (1 Story Eq. Jur., 13th ed., p. 149, note (a); *id.*, p. 108 *et seq.* and notes.) The rigidity of these principles has doubtless been mitigated in many applications of equitable relief. Thus it has been held that the doctrine is confined to cases of pure unmixed mistake of law in which there is no element whatever of mistake of fact. Where there is in some measure a mistake of fact, the tendency of equity is to liberalize the rule. (*King v. Doolittle*, 1 Head, 77.) And Parsons says

(3 Parsons on Contracts, 8th ed., p. 399): "Courts of law, as well as of equity, give relief where there is a mistake both of law and of fact; that is, one who is injured by his mistake of fact does not lose his remedy by having mistaken the law also "

Ignorance of fact and mistake of fact are not precisely equivalent expressions. The former may be mere want of knowledge; the latter always supposes some error of opinion as to the real facts. It is on this distinction that ignorance of foreign law is deemed to be ignorance of fact, and the cases holding that foreign laws are matters of fact to be proved like other facts before courts may notice them proceed upon the theory that until so proved there is entire want of knowledge as to the existence of the law as well as of its terms and meaning. (Story *ut supra*, pp. 158 (note 1), 159; *Bank of Chillicothe v. Dodge*, 8 Barb., 233.) The doctrine, therefore, of the aspect of foreign law as fact merely means that the court will not consider such a law at all until it has been duly proved as a fact; the doctrine does not seem to me to mean that after such proof a foreign law may not be weighed and considered by the court as law.

Now, Story also says (p. 166), in pointing out the general ground of the distinctions as to mistakes of fact respecting materiality and mutuality, that where "there is no concealment of facts, and no surprise or imposition, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference; it is strictly *damnum absque injuria*." Finally, it is to be remembered that the learning upon this subject relates especially, if not solely, to the exceptions to the rule which refuses to permit parol evidence to vary a written contract, and contemplates particularly the intervention of the equitable jurisdiction of courts. Neither of those principles is involved here, but we are dealing with a highly technical statutory subject, and seeking to construe an act of legislation which is not properly subject to liberal prepossessions.

The question narrows down, then, to the nature of the mistake here under the definition of the phrase "errors of fact" in the statute. I do not think the question respecting the French bounty can properly be called a pure question of

fact. The inference seems necessary that in respect to the situation before April 7, 1897, both the Treasury and the Board of General Appraisers contemplated, in reaching their opposite conclusions, an actual French law or ordinance. The question, then, not only involves the existence of a foreign law, but after that law was presented as a fact in existence, its meaning and construction were involved—the judicial weighing of its terms and effect. The error here is not like those errors of fact construed in the Treasury practice, comprising mistakes as to circumstances, dates, values, computations, etc., which lead to false results. The question is one of mixed fact and law. The statute requires that the mistake shall arise *solely* on errors of fact, and, as in my conception of the proper principles to be applied, not permitting here the mitigations of a court of equity, your authority to refund on the ground of mistake is to be restricted to mistakes of fact alone. I am constrained to say that the mistake here did not constitute an error of fact within the meaning of the act of 1875, and I therefore answer your second question in the negative. This renders it unnecessary to answer your third question.

Very respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

#### AMERICAN ARTIST—CITIZEN OF PORTO RICO—DUTIES.

A native Porto Rican, an artist by profession, although temporarily living in France on the 11th day of April, 1899, is, under section 7 of the act of April 12, 1900 (31 Stat., 79), a citizen of Porto Rico, and, as such, is an American artist, whose paintings upon importation into the United States are entitled to the privileges provided in paragraph 703 of the tariff act of July 24, 1897 (30 Stat., 203).

DEPARTMENT OF JUSTICE,

May 13, 1902.

SIR: I have received your letter of April 28, asking my opinion upon the question whether Mr. Molinas, who is an artist by profession, is an "American artist" within the meaning of section 703 of the tariff act of July 24, 1897, and inclosing a letter from the Hon. Federico Degetau,

resident commissioner from Porto Rico, stating that Mr. Molinas had shipped to him certain paintings.

The section reads as follows:

“703. Works of art, the production of *American artists residing temporarily abroad*, or other works of art, including pictorial paintings on glass, imported expressly for presentation to a national institution, or to any State or municipal corporation, or incorporated religious society, college, or other public institution, except stained or painted window glass, or stained or painted glass windows; but such exemption shall be subject to such regulations as the Secretary of the Treasury may prescribe.”

Mr. Molinas, as I understand from Mr. Degetau, is a native Porto Rican, temporarily living in Biarritz, France, who was there and not in Porto Rico on the 11th day of April, 1899, the date mentioned in section 7 of the Foraker Act, which section reads as follows:

“SEC. 7. That *all inhabitants continuing to reside therein* who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, *and then resided* in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, nineteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such *citizens* of the United States *as may reside* in Porto Rico, shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.”

It will be observed that paragraph 703 above quoted does not mention citizenship, but uses the phrase “American artists.” It is clearly not inconceivable for a man to be an American artist within the meaning of such a statute and yet not a citizen of the United States. An American tribal Indian, or a native Alaskan, for example, who should

become an artist and go abroad might naturally be considered an American artist within the intent of the statute.

The word "reside" is used concerning a person who may remain a week in a place, or one who remains a year or two, or one who makes his home there; that is, one who is a permanent resident or *inhabitant*. Undoubtedly section 7 of the Foraker Act, in providing that citizens of the United States who "may reside" in Porto Rico shall constitute part of the body politic of Porto Rico, uses the word "reside" in the last sense. It would have been absurd to provide that every citizen of the United States visiting or temporarily sojourning in Porto Rico should be a citizen of Porto Rico, and it seems not unlikely that throughout section 7 the word "reside" has the same meaning. Section 9 of the act tends to show that it was not used to eliminate from "all inhabitants who were Spanish subjects" at the date of the treaty of Paris, a class of inhabitants who were temporarily absent on any date from Porto Rico, because it provides for the nationalization of all vessels owned by "the inhabitants of Porto Rico" on that date, "and which continued to be so owned up to the date of such nationalization," not excluding vessels owned by inhabitants temporarily absent on any date. And section 18 assumes that "native inhabitants" of Porto Rico will all be citizens of Porto Rico, since it provides that of the executive council, five (5) shall be "native inhabitants," without adding that they shall be citizens of Porto Rico, although, of course, it was not intended to have in the executive council persons who should not be. This interpretation of section 7 is further supported by the consideration that the Foraker Act is to have a reasonable interpretation and is to be regarded as *in pari materia* with the treaty of Paris, so far as that treaty transferred Porto Rico and the allegiance and protection of persons there, from Spain to the United States. It would be unreasonable to suppose, unless we are forced to do so, that any of the persons who were intended by the treaty to remain in Porto Rico, and owe permanent allegiance and be entitled to protection to and from the United States, were intended to be omitted from the body politic called "The People of Porto Rico," and least of all would the native

inhabitants, whose "civil rights and political status" were expressly turned over by the treaty to be determined by Congress, be omitted from that body politic.

The language of section 7 is easily accounted for without seeing an intention to exclude any of such inhabitants; or any *inhabitants* continuing to be such who were turned over by Spain to the United States. The inhabitants who were German, French, or Italian were excluded by confining section 7 to inhabitants who were Spanish subjects at the date of the treaty. Inhabitants at the date of the Foraker Act who were not inhabitants of Porto Rico, but inhabitants and subjects of Spain at the date of the treaty, were not among those turned over by the treaty to the allegiance and protection of the United States, and these are excluded by the phrase referring to the date of the treaty, "and then residing in Porto Rico." And the phrase "continuing to reside," following "inhabitants" serves to omit those inhabitants who were not to remain in Porto Rico, but preferred to leave it; as, in the contrary case, Article IX of the treaty made provision for such of those who were to remain—"who will remain"—*que permanecieran*—as, being natives of Spain, wished to avoid becoming Americans. (See agreement extending election period in the Philippines.)

If this view is correct, then the first part of section 7 has the same meaning as though it had been written thus: "That all present inhabitants continuing *to be inhabitants* who were Spanish subjects on the 11th day of April, 1899, and were then *inhabitants* of Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico."

But even in supposing that a native Porto Rican like Mr. Molinas, temporarily absent at the date of the treaty, has been unintentionally omitted from section 7, he is undoubtedly one of those turned over to the United States by Article IX of the treaty to belong to our nationality. He is also clearly a Porto Rican; that is to say, a permanent inhabitant of that island, which was also turned over by Spain to the United States. As his country became a domestic country and ceased to be a foreign country within the meaning of the tariff act above referred to, and has now been fully

organized as a country of the United States by the Foraker Act, it seems to me that he has become an American, notwithstanding such supposed omission.

For these reasons I am of the opinion that his paintings are entitled to the privileges provided in paragraph 703 of the act referred to.

Respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

---

WAR-REVENUE ACT—BILLS OF LADING.

Under the war-revenue act of June 13, 1898 (30 Stat., 459), a 1-cent stamp should be attached to all bills of lading for goods transported from places within the United States to Canada or Mexico. Such bills being in part domestic, given for transportation within the United States as well as for export, may be taxed upon the domestic part regardless of the ultimate destination of the goods.

Opinion of January 2, 1900 (23 Opin., 3), affirmed.

DEPARTMENT OF JUSTICE,

*May 15, 1902.*

SIR: On December 19, 1899, at the request of certain railroads engaged in the transportation of goods from places in the United States to Canada and Mexico, you submitted to this Department the question whether, under the war-revenue act of June 13, 1898 (30 Stat., 459), a stamp tax of 10 cents was required to be attached to each bill of lading for goods so transported as a foreign bill of lading, or a stamp tax of 1 cent as an ordinary freight receipt on railroad bill of lading; and Attorney-General Griggs held, in his opinion of January 2, 1900, that a stamp tax of 1 cent only was required to be attached. (23 Opin., 3.)

Since the decision of the Supreme Court in *Fairbank v. United States* (181 U. S., 283), holding that the 10-cent stamp tax on foreign bills of lading was unconstitutional, the same railroads have requested you to submit the question whether a bill of lading given by a railroad for goods to be shipped by rail from a point in the United States to Canada or Mexico is not a foreign bill of lading, and therefore exempt from any stamp tax whatsoever.

I have examined the opinion of January 2, 1900, in the light of the decision of the court in the Fairbanks case, and have carefully considered the arguments advanced by counsel for the railroads. I see no reason to change the conclusion reached by Attorney-General Griggs. The proper effect of the decision in the Fairbanks case is merely to eliminate the discriminating stamp tax against foreign bills of lading treated strictly as such; but a bill of lading which is in part domestic, given for transportation within the United States as well as for export, may be taxed upon the domestic part.

In my opinion, all bills of lading for goods transported by rail from place to place within the United States ought to have a 1-cent stamp attached, regardless of the ultimate destination of the goods.

Very respectfully,

JOHN K. RICHARDS,  
*Solicitor-General.*

Approved:

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

---

LEAD BULLION—ASSAY.

While paragraph 181 of the tariff act of July 24, 1897 (30 Stat., 166), which imposes a duty on imported lead ores, contemplates the determination of the quantity of metal in the ore by assay, by paragraph 182 of that act the determination of the quantity of metal contained in imported lead bullion is to be by official weighing only, and the application of assay to lead bullion under the current Treasury regulations for bonded smelters and refiners is without warrant of law.

DEPARTMENT OF JUSTICE,  
*May 15, 1902.*

SIR: Your letter of March 25, inclosing a copy of a letter from the collector of customs at New York relative to the present practice of *assaying* imported lead bullion treated in a bonded smelter and refiner in order to determine the quantity of dutiable metal, cites paragraphs 181 and 182 of the tariff act of 1897, providing for duty on "lead-bearing ores of all kinds" and "lead dross and lead bullion, \* \* \*"



respectively, and cites section 29 of the same act providing for the bonding of smelting and refining warehouses. You inclose a copy of the current regulations relative to such warehouses, and ask for my opinion on the question whether these regulations are in accordance with law in not providing for the assessment of duty on the imported *weight* of lead bullion transferred to a bonded smelter.

Paragraph 181 relates especially to lead ores, and assesses a specific duty on the "lead contained therein." It then provides that on all importations duties shall be estimated at the port of entry and bond given for transportation by bonded common carriers to sampling and smelting establishments; that there the ores shall be sampled under Government supervision and assayed by a Government assayer, and the entries liquidated thereon unless the ores are sent to a bonded warehouse to be refined for exportation.

Paragraph 182 assesses a higher specific rate upon lead dross, lead bullion, or base bullion, and lead in other forms, making no provision for assay; that is, the duty is assessed on gross weight.

Section 29 permits the bonding of smelting and refining works for treatment of "ores or metals in any crude form," imported into the United States to be smelted or refined for exportation. Such merchandise may be removed on importation into the bonded establishment in which smelting or refining or both are carried on, without payment of duties. A quantity of refined metal must each day be set aside equal to 90 per cent of the imported metal smelted or refined that day, and shall not be taken from the works except for transportation to another bonded warehouse or for exportation, although it may also be removed for domestic consumption under Treasury regulations upon entry and payment of duties, the *exportation* of the 90 per cent aforesaid entitling the ores and metals imported to admission without payment of duties.

The collector's letter objects to the conclusion of G. A. 5032 (which construed section 29 exhaustively) only so far as sustaining the practice under the regulations of arriving at the designated percentage of refined metal under section 29 in the case of *lead bullion* as well as *lead ore*, upon the

basis of the quantity of pure metal *as determined by assay*. The collector contends that since assay is required only for lead ore (par. 181) and lead bullion is ordinarily dutiable on weight alone without assay (par. 182), and section 29 makes no mention of assay, this test to determine the quantity of imported metal is erroneously applied to *lead bullion*, resulting in an unwarrantable loss to the revenue, and consequently that the regulations should be amended to agree with the law.

Section 29 and earlier forms of the same law have attached to the tariff schedules special provisions encouraging the reduction of imported ores and metals in this country. Glancing at the schedules separately, and the executive and judicial rulings, it is apparent that there has been much uncertainty under the differing language of former tariff acts in arriving at the proper test of quantity for taxation in the case of lead ores and lead bullion. Lead bullion is a fusion of metals, the product of primary smelting abroad, containing about 97 per cent pure lead by weight. (*United States v. Guggenheim Smelting Co.*, 112 Fed. Rep., 517.)

But it is not necessary to review the doubts under former laws as to classification of lead-bearing ores and lead bullion, and as to quantity test by gross weight or net contents (see, for example, G. A. 1595, 2002, 3262; *Balbach Smelting Co. v. United States*, 81 Fed. Rep., 950; *Guggenheim Smelting Co. case, ut supra*), for the current tariff act makes it clear that all lead *ores* are dutiable on the lead contained and that lead *bullion* is taxed as pig lead. Ordinarily, then, such imported bullion is subject to duty on gross weight as lead, unless being treated in bond under section 29 that section has modified this rule of dutiability.

The law on smelting and refining metals under bond was generally the same under the tariff acts of 1890 and 1894 as under the current act (sec. 24, act of 1890; sec. 21, act of 1894). The only substantial difference is that the effect of the current act, by requiring segregation of 90 per cent of the smelted or refined product instead of the entire product (in order to receive the benefit of exportation), is to give the importer and manufacturer an allowance for "wastage."

The regulations have been modified accordingly, and are now more detailed (cf. T. D. 10585 with T. D. 19501).

None of the laws on smelting and refining in bond provides explicitly for test by assay in the estimations of quantity or quality contemplated or necessarily implied; but the power of the Secretary of the Treasury to make rules and regulations is broadly given and appears to cover the entire course of proceeding from transfer into the warehouse to exportation or withdrawal for consumption; and there is no doubt that the former as well as the present regulations prescribe the determination by assay of the quantity of dutiable refined metal, and this method is applied to crude metals as well as ores. Nor is there any doubt that lead bullion is a crude metal.

The test by assay was formerly controlling in the collection of duties upon a consumption withdrawal as well as upon exportation (par. 4, T. D. 10585). But now (par. 7, T. D. 19501), under a consumption withdrawal, duty is exacted on the entire importation, which appears to mean that in such case, involving crude metals and not ores, assay does not affect the question, but gross weight is the rule. This leaves the point to be considered in case of direct exportation and transportation for rewarehouse and ultimate exportation. Paragraphs 2, 6, 8 (current regulations), and the form of bond for establishing a smelting and refining warehouse (Form F), show clearly that assay is applied equally throughout the entire field to crude metals as well as ores. An illustration will show how the method in vogue operates to the detriment of the Government. On an importation of 2,000,000 pounds of lead bullion, assay shows, say, 97 per cent lead, equaling 1,940,000 pounds. On exportation of 90 per cent of this under the law, 1,746,000 pounds, the remainder, 254,000 pounds, is admitted free. On the other hand, on the gross-weight basis, the amount set aside for exportation would be 90 per cent of 2,000,000 pounds, or 1,800,000 pounds, which would entitle 200,000 to be admitted free. There is a loss, then, of duty at the rate of  $2\frac{1}{2}$  cents per pound on the difference between 200,000 pounds and 254,000 pounds, amounting to \$1,147.50. Where assay shows a

lower percentage than in the illustration given, a correspondingly larger loss to the revenue results.

Now, the necessity of the assay test in the case of ores, as provided in paragraph 181 of the Dingley Act, is obvious, and, on the other hand, it is certain that ordinarily it is neither necessary nor customary for crude metals or metals in pigs to be assayed for purpose of duty. There appear to be no assay provisions in the tariff schedules for any crude metals, but the rule of dutiability by gross weight is applied. This fusion of metals known as lead bullion or base bullion (although, being intermediate between ores and refined metals, it may appear to invoke assay naturally and properly) has been associated for duty purposes with pig lead and other forms of substantially pure lead. Indeed, the merchandise is itself substantially pure lead, containing a very small percentage of other metals and impurities. It seems to me that the law contemplates the determination of the quantity of metal in lead ore by assay and in lead bullion by official weighing only.

Under the foregoing circumstances I am of the opinion that the application of assay to lead bullion under the current regulations for bonded smelters and refiners is without warrant of law, and that the regulations should be revised accordingly. The general authority to frame regulations given by section 29 can not have the effect of nullifying a necessary inference drawn from other parts of the same law, especially since construction should seek to establish all parts of the law as consistent and coherent if possible. Therefore my answer to your question must be in the negative.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

19219-03—4

JURISDICTION OF STATE HARBOR COMMISSIONERS,  
NORFOLK HARBOR.

The State of Virginia, through its legislature, having duly relinquished jurisdiction over the lands belonging to the United States at the navy-yard at Norfolk upon which it is proposed to construct a dry dock, the State board of harbor commissioners for the port of Norfolk and Portsmouth is without authority to require the submission to and approval by it of the plans of the contemplated improvement, although such improvement be within the harbor line established by that board. The authority of the United States over that harbor is paramount and absolute.

DEPARTMENT OF JUSTICE,  
*May 15, 1902.*

SIR: It appears from your communication of the 24th ultimo, with inclosures, that in the construction of the new granite dry dock at the United States navy-yard at Norfolk, Va., it will be necessary to extend the cofferdam at the entrance of the dock about 80 feet inside of the line established by the State board of harbor commissioners for the port of Norfolk and Portsmouth.

Although the contemplated improvement is on ground belonging to the United States, over which Virginia has duly relinquished jurisdiction, the board of harbor commissioners insist that the plans for the contemplated improvement be submitted to and approved by them, in accordance with the provisions of the State law, before the work be proceeded with.

You desire my opinion upon the question whether this demand is warranted.

Under the Constitution, Congress is given power "to regulate commerce with foreign nations, and among the several States," and when Congress once exercises its power under this clause over the navigable waters of the United States the power (so the Supreme Court has held time and again) is paramount and absolute.

In the case of *South Carolina v. Georgia* (93 U. S., 4). Mr. Justice Strong, speaking for the court, said, respecting the contention that Congress can not place an obstruction in a navigable stream (p. 11): "It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States,

either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage."

Akin to the absolute and paramount authority over the navigable waters of the United States in the regulation of interstate and foreign commerce is the power which the Constitution vests in Congress, in providing for the common defense and general welfare, "to provide and maintain a navy," and "to exercise like authority (that is, exclusive jurisdiction) over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

Virginia, through its legislature, consented that the United States should take and use this property for a navy-yard. That meant such a navy-yard, with such docks, structures, and improvements, as the United States might determine the general interest required. Virginia reserved no right to supervise the nature of the navy-yard to be constructed.

As to the harbor, the United States, as I have pointed out, has paramount and absolute authority over it. The jurisdiction of the State board of harbor commissioners is subordinate. It is not to be assumed that the United States, to which is intrusted the protection and improvement of this harbor, will unnecessarily obstruct or interfere with its navigability. On the contrary, it is to be presumed that every interest intrusted to the protection of the United States will be preserved and advanced by carrying out the improvements according to the plans prepared and approved by it.

Your question, therefore, is answered in the negative.

Very respectfully,

JOHN K. RICHARDS,  
*Solicitor-General.*

Approved:

P. C. KNOX.

THE SECRETARY OF THE NAVY.

APPOINTMENT—STUDENT INTERPRETERS AT LEGATION TO CHINA.

The President is authorized, under the provisions of the diplomatic and consular appropriation act of March 22, 1902 (32 Stat., 78), to appoint the ten student interpreters at the legation to China therein provided for without sending their names to the Senate for confirmation.

DEPARTMENT OF JUSTICE,

*May 16, 1902.*

SIR: The diplomatic and consular appropriation act of March 22, 1902, provides "for ten student interpreters at the legation to China. \* \* \* at one thousand dollars each, ten thousand dollars," who "shall be chosen in such manner as will make the selections nonpartisan so far as may be consistent with aptness and fitness for the intended work," and that "upon receiving such appointment each student interpreter shall sign an agreement," etc. The character and manner of appointment are not in terms prescribed. Your letter of April 16, therefore, asks my opinion on the question whether the President is authorized to appoint these interpreters without sending their names to the Senate for confirmation.

You refer to laws providing for interpreters which expressly confer upon the President power to appoint. Thus, section 1680, Revised Statutes, provides that "the President may appoint for the legation to China an interpreter, when the secretary of the legation does not act as such;" and section 3 of the act of June 11, 1874 (18 Stat., 66, 70), provides "that the President shall be, and he is hereby, authorized to appoint interpreters" to certain consulates in China.

Discussing a related subject in an opinion to you, dated May 11, 1900 (23 Opin., 136), my immediate predecessor held in effect that such officers as interpreters do not fall within the constitutional requirement of appointment by and with the advice and consent of the Senate (Art. II, sec. 2, par. 2); that Congress, by the use of the unqualified phrase "may appoint," or equivalent language, had seen fit to give the sole power of appointment to the President; that respecting an office not plainly included in the constitu-

tional requirement of confirmation, that is, respecting "inferior officers" in the sense of the clause of the Constitution cited, the appointment, if requiring the advice and consent of the Senate, is so conditioned in the law creating the office. This subject is also discussed in an opinion dated November 7, 1901 (23 Opin., 574), which I addressed to the Secretary of War (see also opinion addressed to the President dated December 24, 1901; 23 Opin., 599). The doubts suggested by the authorities upon the question of what are inferior offices, and the uncertainty due to differing phraseology of various laws, as well as the effect of practice as establishing a precedent, are indicated in those opinions.

The practice relative to interpreters under laws which gave the power of appointment to the President and did not expressly require confirmation has become established. As to this particular law, the authority to appoint is matter of necessary inference and is not explicitly prescribed. Proceeding by obvious and reasonable analogies, it is my opinion that inasmuch as the law does not require confirmation by the Senate, and yet necessarily confers upon the President the power to select and appoint a certain class of officers whom ordinarily he alone appoints, Congress intended to authorize the President to appoint the student interpreters in question without sending their names to the Senate for confirmation.

Very respectfully,

P. C. KNOX.

The SECRETARY OF STATE.

---

#### CAMEL'S HAIR NOILS—DRAWBACK.

The separation of imported camel's hair into "tops" and "noils" by combing, for the purpose of preparing the material for manufacture, does not result in such "noils" becoming a distinct manufactured article and entitled to drawback within the meaning of section 30 of the tariff act of July 24, 1897 (30 stat., 211).

The drawback law contemplates the manufacture of a separate and complete article which is not merely the finished material of a further stage.

The principle announced in the opinion of Attorney-General Olney (21



Opin., 23), that "a question once definitely answered by a former Attorney-General and left at rest for a long term of years should be reconsidered only in a very exceptional case," concurred in.

DEPARTMENT OF JUSTICE,

*May 16, 1902.*

SIR: It appears from your letter of April 28 that an application has been made for reconsideration of the ruling that "camel's hair nails, resulting from the separation of imported camel's hair into hair and nails, were not entitled to drawback under section 25 of the tariff act of October 1, 1890, as a manufactured article" (21 Opin., 159). Furthering this application, you request an expression of my opinion as to whether camel's hair nails are not entitled to drawback under the provisions of the law mentioned now appearing as section 30 of the tariff act of 1897.

Your letter of April 6, 1895, as well as G. A. 2725 which the applicants invoke, makes it clear that this merchandise results from the separation by combing of camel's hair into "tops" (corresponding to the "long staples" of wool) and the short fibers, or "nails," which on the camel are a soft woolly fur. The decision of the Board of General Appraisers shows that, before combing, camel's hair goes through a cleaning process which advances it to a condition equal to wool which has been washed or scoured. The view of the board's decision undoubtedly is that, in order to separate the nails, camel's hair so far passes through processes of manufacture, and that the object of the manufacture of fabrics from camel's hair, using nails as material, is to obtain this short and downy hair as the more valuable product, rather than the tops, which exactly reverses the case of wool. Such an intermediate manufacturing process, for the purpose of preparing the material of further manufacture, does not necessarily result in a distinct manufactured article. The test as to whether an article is or is not manufactured, for the purposes of the duty schedules, may differ from that applicable in drawback laws. In my opinion the drawback law in question contemplates the manufacture of a separate and complete article which is not merely the finished material of a further stage.

In an opinion rendered to you on February 14 last (23

Opin., 625), a contrasted aspect is presented, the thing *imported* in that case having passed beyond the stage of materials and being itself substantially a completed article to which manufacture in this country merely added the finishing touches.

Mr. Olney's opinion, although brief, is evidently based on careful consideration of all aspects of the case. It is not perhaps accurate, in view of the facts shown, to denominate nails as a "by-product;" but I concur in the principle of my predecessor's ruling, and perceive no sufficient reason to revise the same. "A question once definitely answered by one of my predecessors and left at rest for a long term of years should be reconsidered by me only in a very exceptional case." (21 Opin., 24.)

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

---

#### CUSTOMS LAW—IMPORTATION OF PORTO RICAN PRODUCTS.

All articles of Porto Rican origin exported from Porto Rico to foreign countries after the passage of the Foraker act of April 12, 1900 (31 Stat., 77), may, since the proclamation of the President on July 25, 1901, doing away with the 15 per cent duty imposed under section 3 of that act, be imported into the United States free of duty under paragraph 483 of the tariff act of July 24, 1897 (30 Stat., 195), provided the articles have not been advanced in value or improved in condition by any process of manufacture or other means.

Such free importation does not, however, affect the question of the payment of the internal-revenue tax provided for in section 3 of the Foraker act.

DEPARTMENT OF JUSTICE,  
*May 19, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 8th instant, relative to the expression of an opinion by me as to "whether articles of Porto Rican origin can be exported to a foreign country and imported therefrom into the United States free of duty."

Under paragraph 483 of the tariff act of July 24, 1897, "articles the growth, produce, and manufacture of the United States, when returned without having been advanced

in value or improved in condition by any process of manufacture or other means," may be entered free of duty.

It appears from the cases submitted by you that the Boston Molasses Company, of Boston, Mass., during the year 1901 shipped a cargo of molasses from Porto Rico to Halifax, Nova Scotia, and that the same "is now held in bond at that port, just as imported;" that Herz Brothers, of New York City, in June, 1901, shipped a lot of tobacco from Porto Rico to Canada, a part of which remains there; that Steindler Brothers, of New York City, have in bond in Montreal, Canada, 141 bales of Porto Rican leaf tobacco, shipped there direct from Porto Rico. It is assumed for the purposes of this opinion that this last shipment was made, as were the others, subsequent to the passage of the Porto Rican or Foraker act of April 12, 1900. Can these articles be now brought into the United States duty free?

Section 2 of said Porto Rican act provided that "the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries."

Section 3 provided that merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be subject to the payment of 15 per cent of the duties charged upon like articles of merchandise imported from foreign countries; and in addition thereto, upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale, a *tax* equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture; and on all articles of merchandise of United States manufacture coming into Porto Rico, in addition to the duty above provided, "a *tax* equal in rate and amount to the internal revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture." Said section further provided that upon the happening of certain contingencies and proclamation of the fact by the President, all *tariff duties* between the United States and Porto Rico upon the products of each should cease, and that they should

not be collected in any event after March 1, 1902. Proclamation was accordingly made on July 25, 1901.

Section 14 of said act provided: "That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws, which, in view of the provisions of section 3, shall not have force and effect in Porto Rico."

While the letter of the language used in paragraph 488 may limit the privilege therein conferred to articles produced in the United States, the evident purpose of the paragraph is such that it may well be held to admit a country having the legal status which Porto Rico has now been given. Under section 14 of the Foraker act, previously quoted, all our statutory laws "not locally inapplicable" and not "otherwise provided" are extended to the island. It was, as we have seen, "otherwise provided" as to internal-revenue tax on goods going into Porto Rico from the United States and withdrawn for consumption or sale.

The laws of the United States relating to customs, commerce, and navigation were extended to Alaska, and that country was made a customs district, upon its acquisition from Russia. Provision was also made for the nationalization of all vessels owned by actual residents of the territory at the date of its cession, as was done in the case of Porto Rico.

Under date of July 13, 1878 (Treasury decision 3653), it was held by your Department that section 4347, Rev. Stat., relating to the transportation of merchandise "from one port of the United States to another port of the United States" applies to Alaska; and that section 4367, Rev. Stat., requiring the master of every foreign vessel "bound from a district in the United States to any other district within the same" to deliver, previous to departure, a manifest to the collector, also applies to Alaska. It is believed that since that time Alaska has been regarded by your Department as within the privileges, requirements, and limitations of our customs laws.

No good reason can be found why Porto Rico, now com-

58 *Removal and Destruction of Merchandise Held in Bond.*

pletely brought within our customs bounds, within our navigation laws (Foraker act, sec. 9), and within the benefits of our statute law in general, should not enjoy the benefits of paragraph 483.

I am therefore of the opinion that all articles of Porto Rican origin exported from Porto Rico after the passage of the Foraker act may, since the proclamation doing away with the 15 per cent duty, be imported into the United States under said paragraph 483. This, of course, does not affect the question of the payment of the internal-revenue tax provided in section three of the Foraker act.

Respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

---

REMOVAL AND DESTRUCTION OF MERCHANDISE HELD IN BOND.

Articles of merchandise imported into the United States and held in a bonded warehouse for use in the manufacture of articles for exportation in accordance with section 15 of the tariff act of July 24, 1897 (30 Stat., 207), may be removed from such warehouse and destroyed in the presence of an officer designated by the collector of the port and accounted for as waste, and the manufacturer relieved from the payment of duty thereon.

DEPARTMENT OF JUSTICE,

*May 31, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 25th ultimo relative to an application made by the American Tobacco Company for permission to remove from the bonded manufacturing warehouse of said company, at Durham, N. C., and destroy 565 pounds of imported tin, 28,850 imported photographs, and 10 bobbins of imported cigarette paper, which said company represents are "an accumulation of waste incident to manufacture, and discarded by reason of being unfit for sale."

You state that this merchandise was transferred to said bonded warehouse for use in the manufacture of articles for exportation in accordance with section 15 of the act of July 24, 1897, and ask for an expression of my opinion as to whether the same may now be removed from said ware-

house and destroyed "either without or with the payment of duties."

The evident scope, intent and purpose of section 15, above referred to, is to permit the domestic manufacture of imported merchandise for foreign consumption without the payment of duties on such merchandise. American labor is thereby benefited and our revenue not lessened or affected for the obvious reason that the imposition of duties would probably result in such merchandise being manufactured abroad. The privilege conferred under section 15 is safeguarded with provisions and restrictions aimed to prevent the unlawful removal of any part of such bonded merchandise for domestic consumption; but there is nothing in these restrictions that prohibits the destruction of waste material.

Section 23 of the act of June 10, 1890, is particularly applicable to goods imported for domestic consumption, and the provision therein for an allowance on account of goods damaged in transit in no way affects the question of the right of the manufacturer of bonded merchandise to destroy waste material.

I am, therefore, of the opinion that if such material is destroyed in the presence of an officer designated by the collector of the port, it can be accounted for as waste, and the manufacturer relieved from the payment of duty thereon.

Respectfully,

JOHN K. RICHARDS,  
*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

---

ATTORNEY-GENERAL—OPINION.

The settled policy of the Department is that no opinion should be rendered upon any question of law unless it is specifically formulated in a case actually arising in the administration of a Department, and accompanied by a statement or finding of the facts involved.

Nor will the Department consider any question committed to judicial review. To do so might bring it into conflict with a judicial tribunal. The conclusions of a Federal court, until reversed by a higher court, are binding upon the Attorney-General.

DEPARTMENT OF JUSTICE,  
*May 31, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of April 21, 1902, from the Hon. W. B. Allison and

the Hon. Robert G. Cousins, relative to the legal status of certain Indians in Iowa and the jurisdiction of the State of Iowa over them, with respect to crimes committed either on the Indian reservation or outside of its limits.

Your letter does not request an opinion on any specific question, but only "upon the questions set out in the communication submitted." Referring to this communication, it appears that my opinion is requested upon various questions affecting the status of the Indian tribes in question, and involving generally the application of the civil and criminal laws of the State of Iowa to such Indian tribes and its jurisdiction over them. The purpose for which these opinions are requested is, as stated in the communication submitted to you, "to secure such legislation as may be deemed necessary."

I regret to say that compliance with your request would involve a departure from the settled policy of this Department with respect to such opinions. My predecessors have repeatedly held that no opinion should be given upon any question of law unless it is "specifically formulated" in a case "actually arising in the administration of a department, and accompanied by a statement or finding of the facts involved." (23 Opin., 330, 473, and the opinions there cited.)

Moreover, your correspondents in effect ask me to review the decisions of the United States circuit court for the northern district of Iowa in the case of *Ma-Ka-Ta-Wah-Qua-Twa v. Rebok* (111 Fed. Rep., 12), and *Peters v. Malin* (111 Fed. Rep., 244). In these cases the status of these Indians, and the application of the laws of Iowa to them, were discussed at length by Judge Shiras, and his conclusions, until reversed by a higher court, are necessarily binding upon this Department. Even if the question should be regarded as still *sub judice*, this Department has uniformly refused to consider any questions that have been committed to judicial review. To do so might "bring this Department into conflict with a judicial tribunal," and this has been held to be an adequate reason for a refusal to give an official opinion. (23 Opin., 221.)

For the reasons suggested, I am unable to comply with your request.

Respectfully,

JAMES M. BECK,  
*Acting Attorney-General.*

THE SECRETARY OF THE INTERIOR.

---

CUSTOMS LAW—INFORMER'S COMPENSATION.

Notwithstanding the absence of the certificate provided for by section 6 of the act of June 22, 1874 (18 Stat., 186), the Secretary of the Treasury is authorized, under section 4 of that act, to award compensation to a Canadian customs official who furnished information which resulted in a forfeiture of certain diamonds for violation of section 3082, Rev. Stat.

A deputy collector of customs, with headquarters in the customs district of Vermont, but stationed for service at Montreal, Canada, is a "chief officer of customs" within the meaning of section 4 of the above-named act, which authorizes the payment of a reward for original information leading to the discovery of any fraud upon the customs revenue.

DEPARTMENT OF JUSTICE,

*June 4, 1902.*

SIR: Your letter of May 20 informs me that a Canadian customs officer claims compensation as informer under section 4 of the act of June 22, 1874, in a seizure case; that as a result of the information received from this man the Government secured about \$31,000 from the forfeiture, by judicial proceedings, of certain diamonds for violation of section 3082, Revised Statutes; that section 6 of the act of 1874 provides that no payment shall be made to an informer in any case wherein judicial proceedings are instituted unless the claim to reward is established to the satisfaction of the court and a certificate of the value of the services given by the court to the Treasury, which certificate, however, shall not be conclusive upon the Secretary as to the value of the services; that in the present case the court holds that section 6 attempts to confer upon the judiciary a power not judicial, and that the courts are without jurisdiction to make the required certificate; that thereupon the point has been raised in favor of the informer that since section 6 has been declared in effect to be unconstitutional and inoperative,



section 4 of that act remains in full force, and that under section 4 the authority of the Secretary to make an award is clear, and therefore the award in this case may now be made, notwithstanding the absence of the certificate required by section 6. Upon these facts you submit to me the question whether or not your Department is authorized to award compensation in the absence of the certificate of section 6.

Section 4 (act June 22, 1874, 18 Stat., 186) provides that—  
\* \* \* “whenever any person not an officer of the United States shall furnish to a district attorney, or to any chief officer of the customs, original information concerning any fraud upon the customs revenue, perpetrated or contemplated, which shall lead to the discovery of any duties withheld, or of any fine, penalty, or forfeiture incurred \* \* \* such compensation may, on such recovery, be paid to such person so furnishing information as shall be just and reasonable, not exceeding in any case the sum of five thousand dollars.” \* \* \*

The information in this case was given to a *deputy* collector of customs, with headquarters in the customs district of Vermont, but stationed for service at Montreal, Canada. He thus appears to have been in reality the “chief officer of the customs” who was available for the receipt of this information in order that it might be promptly and effectively used by this Government. In 20 Opin., 690, Mr. Olney holds that the information, in order to justify the reward, must be conveyed directly to the chief officer of the customs; but he is also of opinion that there may be circumstances where information transmitted to or through an inferior officer may properly be considered as coming to the chief officer within the meaning of the statute. Under the facts of this case I think this is an instance within the exception or concession of Mr. Olney’s opinion. The deputy collector appears to have been the chief officer of customs in the service in Canada.

Section 6 of the act provides for a certificate of the value of the informer’s service, as above stated, by the court or judge before whom the subsequent forfeiture proceedings are instituted.

In *Ex parte Riebeling* (70 Fed. Rep., 310) it is decided, in

accordance with well-known precedent authorities holding that the courts are without jurisdiction to perform any other than judicial functions, that section 6 "is an attempt to confer upon the court or judge a power not judicial, which Congress has no power under the Constitution to require the judiciary to exercise, and accordingly the courts and judges are without jurisdiction to make such certificate." This decision, which is carefully considered, reviews and approves the decision to the same effect in *Ex parte Gans* (17 Fed. Rep., 471), which was in all essential respects similar to the Riebeling case.

These decisions intimate that section 6 was intended to modify or limit the power given under section 4; and state that the provision may have been intended as a check on the Secretary; that nevertheless the section presents the anomaly of confounding or confusing judicial and executive functions. "The duty attempted to be imposed by section 6 upon the courts is simply clerical in its nature, which may be as conveniently and efficiently discharged by any competent member of the Executive Department." It is also noted that section 6 expressly provides that the Secretary is not bound by the certificate of the court as to the amount of the compensation awarded.

I think these opinions are conclusive on the point. They clearly amount to a decision that section 6, so far as attempting to impose an executive function upon the courts, is unconstitutional and inoperative. This gives to section 4 full and unqualified effect in cases in which there are, as well those in which there are not, judicial proceedings. I therefore have the honor to advise you that the Treasury Department is authorized to award compensation in the case submitted, notwithstanding the absence of the certificate provided for by section 6 of the act of June 22, 1874.

Very respectfully,

JOHN K. RICHARDS,  
*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

**CENSUS OFFICE—EMPLOYMENT—HONORABLY DISCHARGED SOLDIERS.**

The preference given honorably discharged soldiers of the United States by section 5 of the act of March 6, 1902 (32 Stat., 51), in the matter of employment in the Permanent Census Office, is not absolute and regardless of qualifications. Such preference is to be given if the person is equally qualified; but the appointing power still retains and must exercise its discretion and judgment in determining the fitness for the required work of the persons to be selected and retained.

To this end the Director of the Census may fix a reasonable standard of fitness, and guard it by reasonable regulations intended and calculated to secure an efficient permanent force. Such regulations may relate to age, experience, rating, proposed time of service, etc.

The preference given by the statute is one with respect to the place sought or held; but if a person of the preferred class fails to secure the place he seeks, or to retain the one he has, there is no obligation on the appointing power to create a vacancy by dismissing an efficient employee to give him another chance.

DEPARTMENT OF JUSTICE,

*June 5, 1902.*

SIR: I have your letters of the 23d and 31st ultimo and of the 3d instant, inclosing communications from the Director of the Census, in which are propounded certain questions concerning the interpretation of the statutes requiring preference to be given to honorably discharged soldiers and sailors, and their widows and orphans, in appointment or retention in the public service. An early opinion upon the points presented is urged, to aid the Director of the Census in selecting the force of 800 clerks who are to be retained, the 1st of next July, in the Permanent Census Office.

The statutes referred to, presented in chronological order, are as follows:

By the act of March 3, 1865, carried into the Revised Statutes (approved June 22, 1874) as section 1754, it is provided:

“Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices.”

A similar declaration of public policy, with respect to re-

tention in office, is found in the act of August 15, 1876, which reads as follows (19 Stat., 169):

“Provided, that in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors.”

In the seventh section of the act of January 16, 1883, for the regulation and improvement of the civil service, it was further provided (22 Stat., 406):

“But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes.”

The fifth section of the act of March 6, 1902, providing for a Permanent Census Office, contains this provision, to which my attention is more particularly directed (32 Stat., 52):

“And persons who have served as soldiers in any war in which the United States may have been engaged, who have been honorably discharged from the service of the United States, and the widows of such soldiers, shall have preference in the matter of employment.”

These being the provisions of law, the questions submitted are designed to elicit an opinion as to the extent of the limitation they place upon the discretion of the appointing power in the selection of the employees to be retained in the Permanent Census Office. For example, the question submitted in your letter of the 23d ultimo is whether the fifth section of the act of March 6, 1902, above quoted, requires a preference to be given honorably discharged soldiers and their widows for permanent appointment on the 1st of next July, regardless of their qualifications and efficiency as compared with other employees. Other questions of a similar nature, presenting in various phases the

same general inquiry, are propounded in your other communications.

The effect of the preference prescribed in section 1754, Revised Statutes, came before Attorney-General MacVeagh in the case of a night inspector in the New York custom-house, who, being a soldier honorably discharged by reason of disability from wounds incurred in the line of duty, claimed the right to be appointed permanently without reference to the civil-service rules promulgated by the President under authority of the act of March 3, 1871 (Rev. Stat., 1753). Respecting the power of the President in view of the preference given soldiers and sailors, Attorney-General MacVeagh said (17 Opin., 195):

“These two expressions of the legislative will form one harmonious system. They do not exempt honorably discharged soldiers and sailors from liability to examination, but they do prescribe that of two or more applicants found to be equally qualified by such examination for appointment the preference shall be given to any such applicant who has been honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty.

I concur in the view thus indicated, that these statutes regulating appointment and retention in the public service are to be considered as *in pari materia*. They form parts of one harmonious system. A preference is given, but not to the prejudice of the public service. The preference given is one which follows fitness for the place. Other things being equal, the man who has served his country in war is to be preferred in appointment or retention in the public service. This is indicated by the phraseology of the preference acts. Thus, the preference contained in section 1754, Revised Statutes, is limited by the proviso that the person claiming it shall “possess the business capacity necessary for the proper discharge of the duties of such office;” and the preference contained in the act of August 15, 1876, above quoted, is restricted to those “who may be equally qualified.”

The preference contained in the act of March 6, 1902, now under consideration, must, I take it, be construed in

harmony with the line of public policy indicated. A preference "in the matter of employment" is given to soldiers and their widows. While there are no qualifying words, with respect to capacity or fitness, such limitations must of necessity be read into the act. Certainly the person relying on the preference must be fit for the place sought, equally fit with others, or he can not, with a due regard for the interest of the service, be preferred over them. No vested or exclusive right to a particular office was intended to be given. The preference was in the nature of a declaration of public policy, intended to reward patriotism in time of war by preferring soldiers for public service in time of peace, where other things are equal. It is obvious, therefore, that the preference is always conditioned upon the fitness of those who claim it, and necessarily limited by considerations of public policy affecting the good of the service. As Mr. Justice Brewer said, in *Keim v. United States* (177 U. S., 290, 295), "it would be an insult to the intelligence of Congress to suppose that it contemplated any degradation of the civil service by the appointment to or continuance in office of incompetent or inefficient clerks simply because they had been honorably discharged from the military or naval service."

The opinion of Attorney-General MacVeagh, from which I have quoted, was followed by an opinion of Attorney-General Miller, in which he said (19 Opin., 318):

"I have no doubt that it was the purpose of Congress to make it the *duty* of those making appointments for civil offices to give a preference, other things being equal, to the class of persons named in this section. Of course, as the Assistant Attorney-General for the Post-Office Department says, the matter of capability and personal fitness is still a matter of judgment for the appointing power."

The correctness of these conclusions is confirmed by the decision of the Supreme Court in the case of *Keim v. United States* (177 U. S., 290). Keim, an honorably discharged soldier, was dismissed from one of the departments for inefficiency. He claimed that in view of the statutory preference his dismissal was unlawful. The Supreme Court, after citing the preference statutes, said (p. 293):

“The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.”

And again (p. 295):

“Nowhere in these statutory provisions is there anything to indicate that the duty of passing, in the first instance, upon the qualifications of the applicants, or, later, upon the competency or efficiency of those who have been tested in the service, was taken away from the administrative officers and transferred to the courts. Indeed, it may well be doubted whether that is a duty which is strictly judicial in its nature. It would seem strange that one having passed a civil service examination could challenge the rating made by the Commission, and ask the courts to review such rating, thus transferring from the Commission, charged with the duty of examination, to the courts a function which is, at least, more administrative than judicial; and if courts should not be called upon to supervise the results of a civil service examination, equally inappropriate would be an investigation into the actual work done by the various clerks, a comparison of one with another as to competency, attention to duty, etc. These are matters peculiarly within the province of those who are in charge of and superintending the Departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.”

It is my opinion, therefore, that while, under the provisions of section 5 of the act of March 6, 1902, it is the duty of the appointing power to give preference in the matter of employment in the Permanent Census Office to the class of persons described therein, this preference is not absolute and regardless of qualifications and efficiency. A preference is to be given if the person is equally qualified. Nevertheless, the appointing power retains and must exercise its discretion and judgment in considering and determin-

ing the fitness for the required work of the persons to be selected and retained.

This general answer embodies a principle which, when applied, solves the questions contained in the various communications of the Director of the Census, which are largely of an administrative nature. Since he must pass upon the fitness of the persons to be selected and retained, he has a right to fix a reasonable standard of fitness, and to guard it by reasonable regulations intended and calculated to secure an efficient permanent force. Such regulations may relate to age, experience, rating, proposed time of service, etc.

Finally, the preference given by the statute is one with respect to the place sought or held. The person of the preferred class who applies for a vacant place is to be given that place if he is equally qualified, and he is to be retained therein as long as the good of the service will not suffer. But if he fails to get the place he seeks, or to hold the place he has, there is no obligation on the appointing power to create a vacancy by dismissing an efficient employee in order to give him another chance.

Respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

The SECRETARY OF THE INTERIOR.

---

GERMAN LETTERS ROGATORY—EXECUTION OF BY UNITED STATES COURT.

The Attorney-General can not properly pass upon the question whether the courts in this country have authority to execute letters rogatory issued out of the German patent office, as that is a matter for judicial and not for executive determination.

Congressional legislation recommended which shall explicitly authorize the issuing of letters rogatory by the Patent Office of the United States, and shall clothe Federal courts with power to execute letters issued by those patent offices of the recognized powers which possess and exercise well-defined judicial functions.

DEPARTMENT OF JUSTICE,

*June 9, 1902.*

SIR: It appears from your letter of April 12 that certain letters rogatory were issued out of the Patent Office for



70 *German Letters Rogatory—Execution of by U. S. Court.*

execution in Germany, and that on being forwarded to our embassy at Berlin to put in course of execution, the German foreign office has expressed the desire that this Government declare officially that the courts of the United States would in any similar case execute letters rogatory issued by the German patent office. You request an expression of my views upon the point whether the courts in this country have authority to execute letters rogatory issued out of the German patent office, and suggest that if this authority is lacking, proper recommendation should be made to Congress with a view to legislation to regulate the subject.

The usual practice in England and the United States has been to take testimony abroad by open commission issued from a court of record and directed to persons vested with no local judicial authority in the foreign country, who proceed as commissioners of the instance court to obtain voluntary testimony. (Wharton on the Conflict of Laws (1882), sec. 723 *et seq.*) This method was formerly the usual and the only regular mode of taking depositions in a foreign country. (*Stein v. Bowman*, 13 Pet., 209; *Froude v. Froude*, 1 Hun., 76.) Letters rogatory or requisitorial, drawn from the civil law, have obtained, as a rule, on the Continent of Europe, and are currently employed more frequently than at an earlier day. Under such letters, and by the doctrines of international law respecting comity, the courts of each country are held bound to execute commissions to take evidence, subject to the proviso that the requirement shall contain nothing to prejudice national sovereignty, and that reciprocity in such matters shall be assured.

It seems to be well settled that letters rogatory are issued only when an ordinary commission can not be executed, that their use rests wholly upon comity between foreign states, that interrogatories are generally attached, and that the law of the forum to which the letters are addressed governs the procedure under them. (Whart. Conf. Laws, *ut supra*; *Nelson v. United States*, 1 Pet. C. C., 235; *Kuehling v. Leberman*, 9 Phila., 160; *Doubt v. Pittsburgh R. R. Co.*, 6 Pa. Dist. Rep., 238; sec. 4071, R. S.)

Section 875, Revised Statutes, provides for letters rogatory from United States courts in suits in which the United

States have an interest; and *per contra*, for letters rogatory addressed from a foreign court to a circuit court of the United States. And sections 4071-4074, Revised Statutes, provide for the taking of testimony in this country, to be used in foreign countries, in suits for the recovery of money or property in which the foreign government has an interest, either by commission or letters rogatory, under the authority and supervision of the district judge of the district where the witness resides. So that the United States has recognized by statutory provisions and judicially the principle of international comity involved. The various States, either under statutes or pursuant to general doctrines, reciprocate with each other and with foreign countries in the same manner.

But certain foreign governments are unwilling to permit testimony to be taken in the less formal way by open commission, and in that case, before the Federal statutes definitely recognized the proceeding by letters rogatory to the limited extent indicated, the Supreme Court held that letters rogatory may be issued "for the purpose of obtaining testimony when the government of the place where the evidence is to be obtained will not permit a commission to be executed." (*Nelson et al. v. United States*, *ut supra*; 1 Foster's Fed. Prac., 3d ed., sec. 290, and note; *Gross v. Palmer et al.*, 105 Fed. Rep., 833.) It seems that Germany is such a country, and that the ground of objection by the German Government to the execution of a commission is that this customary practice, committing the examination not to a local tribunal but to an individual acting as commissioner of the foreign court, may involve an invasion of sovereign rights. Germany prefers that testimony taken within her borders to be used abroad shall be subject to the control of the established German courts under letters rogatory. (3 Whart. Int. Law Dig., c. 23.)

The United States Patent Office customarily issues commissions to take testimony in foreign countries (rule 158, Patent Office Rules of Practice) under the authority of section 4905, Revised Statutes, which authorizes the Commissioner of Patents to establish rules for taking affidavits and depo-

## 72 *German Letters Rogatory—Execution of by U. S. Court.*

sitions required in cases pending in the Patent Office, but does not explicitly refer to the taking of testimony abroad.

The Commissioner of Patents has decided in the case of *Potter v. Ochs* (97 Official Gazette of the Patent Office, p. 835) that, under section 4905 and the provisions of rule 158, he has authority to issue letters rogatory; and accordingly the letters which produced your inquiry were issued addressed to the royal district court at Berlin. The Commissioner's decision is based upon the view that courts of the United States issue letters rogatory under similar circumstances; that the Commissioner of Patents possesses judicial functions analogous to those of courts (*United States ex rel. Bernardin v. Duell*, 86 O. G., 995); but that since the Commissioner is not authorized by law to issue subpoenas to compel the attendance of witnesses, he is not able in issuing letters rogatory to make the offer usual in such instruments to render a like service to the foreign court. He also relies for the regularity of his action on the view that the courts of this country stand ready to render such service to the courts of Germany when requested, and expresses the belief that the courts of this country would comply with such a request issued by the German patent office under similar circumstances.

There is no doubt that the Patent Office embraces a judicial side, as pointed out in the case of *Bernardin v. Duell*, just cited. The Commissioner as to various aspects of patent laws exercises judicial functions, and the questions involved bear a judicial character. It also appears that the German patent office exercises similar judicial functions under different provisions of the imperial patent laws; indeed, in German patent law the analogy to a court seems to be even more pronounced.

It is obvious that this is a field where the influence of comity may properly be liberal and does not appear to be liable to abuse. For these executive branches of the respective governments are established and responsible agencies of administration. They are peculiarly sensitive to enlarging notions of international reciprocity as applied to inventive skill and products of the brain. They possess and exercise important judicial functions, and the Patent Office

of the United States, at least, does, as a matter of fixed practice, issue commissions, which have historically issued from courts alone as strictly as letters rogatory.

Nevertheless, as I have just implied, the fundamental idea undoubtedly is that either one of these methods of obtaining testimony abroad proceeds as a charter or authority granted by a regular judicial tribunal. The precise question before me is whether the courts in general of this country have authority to execute letters rogatory issued from the German patent office. Now, I think the opinion may safely be ventured that if Germany saw fit to issue a commission by her patent office, voluntary testimony could be obtained here (as it is thus usually obtained by us abroad), although the *statutory* ancillary process of *Federal* courts, if needed, in such case, is restricted to certain suits, as indicated *ante* (Revised Statutes, sec. 4071). But it is probable that the power and discretion of Federal courts in this particular, existing as elementary and antecedent to the statutes (*Stein v. Bowman; Nelson v. United States*, above cited), is not restricted by the statutes, but simply directed or commanded *pro tanto*. It may, indeed, be that the open commission is unknown to German jurisprudence, or is not commonly employed thereunder, and doubtless our courts might be influenced by the failure to reciprocate; yet I understand from the correspondence that commissions are sent from Germany to this country—that this privilege not only would be, but is freely given by courts of this country to subjects of Germany (letter of the Secretary of the Interior, May 16, 1902). However, even as to the simpler procedure under commission, I am unable to construe or predict, beyond the point of high probability just indicated, the status of a commission from the German patent office in the various jurisdictions and systems of the States of this Union. And when we turn to the subject of letters rogatory, by which ordinarily regular courts of exclusive judicial jurisdiction call upon the friendly aid of such courts abroad and offer reciprocation, the judicial character of the question more plainly appears; such a question I am not permitted to answer (13 Opin., 160; 19 Opin., 56; 20 Opin., 210, 314, 539; 21 Opin., 369, 557, 583); I can not speak for

the courts. It is for the different courts of the various jurisdictions, Federal and State, to say when the point comes before them for decision whether or not they have the necessary authority in the premises. It is manifest that I can not properly pass upon such a question, which is preeminently matter for judicial and not executive determination.

Therefore, I have the honor to say, responding to your alternative suggestion, that it may be well to propose to Congress legislation which shall explicitly authorize the issue of letters rogatory by the Patent Office of the United States, and shall clothe Federal courts with the power to execute letters issued by those patent offices of the recognized powers which possess and exercise well defined judicial functions.

Very respectfully,

P. C. KNOX.

The SECRETARY OF STATE.

#### OFFICERS OF THE MARINE CORPS—RELATIVE RANK.

The mere promotion of two officers in different departments of the Army does not, under sections 1603 and 1219, Revised Statutes, disturb their preexisting relative rank.

Section 1219, Revised Statutes, does not purport to regulate merely the relative rank of officers in the same department of the Army, but is intended to fix the relative rank of the various officers of different departments of the Army.

There is no warrant, therefore, for holding that promotions are appointments where the officers promoted are in different departments of the Marine Corps, but are not appointments where they are in the same department.

Opinion of Attorney-General MacVeagh of August 17, 1881 (17 Opin., 196), and of Attorney-General Brewster of May 18, 1882 (17 Opin., 362), reaffirmed.

DEPARTMENT OF JUSTICE,  
*June 11, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of April 17, 1902, in which you request my opinion as to the relative rank of two officers of the Marine Corps, such rank, by section 1603, Revised Statutes, being determined by the provisions of law regulating relative rank in the Army.

The question therefore arises under the following provision of the act of March 2, 1867 (14 Stat., 434):

“That in computing the length of service of any officer of the Army in order to determine what allowance and payment of additional or longevity rations he is entitled to, and also in fixing the relative rank to be given to an officer as between himself and others having the same grade and date of appointment and commission, there shall be taken into account and credited to such officer whatever time he may have actually served, whether continuously or at different periods, as a commissioned officer of the United States, either in the Regular Army or, since the nineteenth day of April, eighteen hundred and sixty-one, in the volunteer service, either under appointment or commission from the governor of a State or from the President of the United States; and the provision herein contained as to relative rank shall apply to all appointments that have already been made under the act to fix the military peace establishment of the United States, approved July twenty-eight, eighteen hundred and sixty-six.”

The substance of this act was codified in the Revised Statutes in section 1219, and the question of the relative rank between officers “having the same grade and date of appointment and commission” must be determined in accordance with the requirements of said act.

It appears from your statement of facts that until May 17, 1877, Colonel Reid outranked Colonel Goodloe by seniority in commission. On that day Colonel Goodloe was appointed major and paymaster, and subsequently, on May 2, 1894, Colonel Reid was appointed major, adjutant, and inspector. Both of these last-named commissions were appointments by selection at the discretion of the appointing power, and were not promotions under the statutes regulating such promotions. From May 17, 1877, therefore, Colonel Goodloe outranked Colonel Reid by seniority of commission, and on March 3, 1899, under the act of March 3, 1899 (30 Stat., 1008), both officers were promoted to the rank of colonel.

If the promotion of the two officers in question on March 3, 1899, gives them the “same grade and date of appoint-

ment and commission," then it is obvious that Colonel Reid outranks Colonel Goodloe, inasmuch as Colonel Reid was commissioned a second lieutenant five years prior to Colonel Goodloe. If, on the contrary, such promotion on March 3, 1899, is not to be regarded as an "appointment" within Revised Statutes, 1219, then the relative rank of the two officers as it existed between March 17, 1877, to March 3, 1899, remains unaffected.

This question has already been considered by this Department, and made the subject of official opinions. On February 21, 1881, upon the request of the Secretary of War, Attorney-General Devens (17 Opin., 34), held that a promotion was an "appointment" within the meaning of the act of Congress already cited. As this opinion was opposed to the practice of the War Department as it had therefore existed since the passage of the act, the Secretary of War, on May 6, 1881, requested this Department to reconsider the question. This Department, in an opinion by Attorney-General MacVeagh (17 Opin., 196), reconsidered its former opinion, and reversed the conclusion therein reached. The conclusion of that opinion is thus stated by Attorney-General MacVeagh:

"I am constrained, therefore, to advise you that the word 'appointment' in section 1219 of the Revised Statutes applies only to the *original entry* of the officer into the regular service, or subsequent appointment *by selection*, but that it does not apply to promotions by seniority as defined in the Regulations of the Army."

This conclusion was reaffirmed by an opinion of Attorney-General Brewster on May 18, 1882 (17 Opin., 362).

It is contended in the brief of argument submitted by Colonel Reid that these opinions of Attorneys-General MacVeagh and Brewster, as well as the legislation which they sought to interpret, should be limited to cases where promotions of two officers claiming precedence by relative rank were in the same department of the service. He contends that inasmuch as their respective lineal ranks by promotion were independent of each other, such promotions must be regarded as having all the force and effect of

“appointments” within the meaning of Revised Statutes, 1219.

In my opinion neither the section of the Revised Statutes referred to, nor the two opinions of this Department which interpret it, are thus limited in their application. The section cited does not purport to regulate the relative rank in the same department of the Army, but is apparently intended to fix the relative rank between the various officers of the different departments of the Army by giving to such officers, where “the same grade and date of appointment and commission” exists, the benefit of seniority in service, whether as a volunteer or regular. To hold that promotions are appointments where the officers thus promoted are in different departments, but are not appointments where they are in the same department, is to narrow the application of the statute by reading into its general provisions a substantial qualification of which its language gives no suggestion.

I presume it is as important to have a method of determining the question of relative rank between officers of different departments as it is between officers of the same department, and I can not conclude that the act of Congress was intended to meet one contingency and ignore the other. The opinions of Attorneys-General MacVeagh and Brewster do not suggest any such distinction. Their opinions had reference to the military establishment of the United States. As Attorney-General MacVeagh clearly said (17 Opin., 197):

“As I understand it, a clear and well-defined distinction between appointment and promotion has existed and been recognized in the War Department continuously since the establishment of the Army. Appointment is the selection of persons not now in the Army, as officers of it, or the designation *by selection* of an officer already in the Army to a vacancy which is not required by the law or the regulations to be filled by promotion according to seniority. Promotion is the advancement of officers already in the Army, according to seniority, *to vacancies happening in the different arms of the service*, and according to rules prescribed by law or by regulations having the force of law.

“I understand also that since the passage of the act of March 2, 1867, it has been the uniform practice of your



Department to fix the relative rank of officers receiving appointments, within the meaning of that term as herein defined, at the time of such appointment; and that their relative rank thus fixed is not thereafter disturbed by any subsequent promotion, but that subsequent promotion and rank is by seniority in the regular service."

In this connection the terms of the act of Congress under which Colonel Goodloe and Colonel Reid were promoted are not without force. The provision reads:

"That the vacancies created by this act in the departments of the adjutant and inspector and paymaster shall be filled first by promotion according to seniority of the officers in each of these departments, respectively, and then by selection from the line officers on the active list of the Marine Corps."

It will thus be seen that there is a distinction in the act between "promotion" and appointments by "selection."

For these reasons, I concur in the opinion which you expressed in ruling upon this case, that "the mere promotion of two officers does not disturb their preexisting relative rank," and that therefore Colonel Goodloe continues to outrank Colonel Reid.

I return you the inclosures of your letter.

Respectfully,

P. C. KNOX.

The SECRETARY OF THE NAVY.

---

. CENSUS OFFICE—SPECIAL AGENTS.

The Director of the Census is authorized, under section 7 of the act of March 6, 1902 (32 Stat. 51), to employ special agents temporarily in the Census Office at Washington upon special work not clerical in its nature.

The words "all employees of the Census Office" in section 5 of the above-named act can not be held to apply to special agents or other field employees who may be temporarily assigned to service in the Census Office.

DEPARTMENT OF JUSTICE,

*June 21, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 21st instant, in which you submit a question as

to the authority of the Director of the Census to employ special agents temporarily in the Census Office at Washington.

By section 4 of the act of March 3, 1899 (30 Stat., 1014), entitled "An act to provide for taking the Twelfth and subsequent Censuses," provision was made for the appointment by the Director of the Census of certain statisticians, clerks, etc., who should constitute the office force employed in the census work, such appointments being "subject to such examination as said Director may prescribe," under section 5 of the act.

By section 6 of the act the collection of the information required for the census was to be made by supervisors, enumerators, and special agents, who were to constitute the field force employed in the census work, and whose appointment was not subject to any examination.

Section 17 of the act, after fixing the compensation to be paid to special agents, provided "that no pay or allowance in lieu of subsistence shall be allowed special agents when employed in the Census Office on other than the special work committed to them, and no appointments of special agents shall be made for clerical work."

The act of March 6, 1902, entitled "An act to provide for a permanent Census Office" (32 Stat. 51), provides, in section 4, for the office force of the Permanent Census Office thereby established. The "permanent clerical force in the Census Office" thus provided for is by section 5 brought within the operation of the civil-service law. No reference is made to special agents in this connection.

By section 7 of the act it is provided that "for the purpose of securing the statistics required by this section the Director of the Census may appoint special agents when necessary," to be compensated as thereafter provided, and by section 10 the provision of section 17 of the act of 1899, above referred to, is reenacted *in totidem verbis*. No provision is made in the act for the examination of special agents, and they are not brought within the operation of the civil-service law.

In reenacting the provision of section 17 of the prior act, "that no pay or allowance in lieu of subsistence shall be

allowed special agents when employed in the Census Office on other than special work committed to them, and no appointments of special agents shall be made to clerical work," Congress apparently contemplated the use of special agents in the office work of the Permanent Census Office. The question then is, whether the Director of the Census is authorized, with your approval, to employ special agents temporarily in the Census Office, upon special work committed to them and with which they are familiar, not clerical in its nature.

It is to be presumed that in enacting the law of 1899, Congress legislated with knowledge of the proper requirements for taking a census. Apparently it was foreseen that, in preparing for publication the data gathered by special agents in the field, the services of these agents, by way of advice and supervision in the Census Office at Washington, would be of value. Accordingly, provision was made for this purpose, and in the act of 1902 this provision was continued.

The act of 1902 was designed to establish a Census Office in permanent form. By authorizing, in section 10, the Director "in his discretion to employ the clerical force of the Census Office for such field work as may be required to carry out the provisions of sections 7, 8, and 9, in lieu of employing special agents for that purpose," Congress left it to the discretion of the Director to use the clerical force of the office in the field work usually performed by special agents. In like manner, by the reenactment of the provision of section 17 of the act of 1899, the employment of special agents in the Census Office at Washington was permitted in the discretion of the Director, subject to the qualification that "no appointments of special agents shall be made for clerical work," and that when employed in the Census Office on other than the special work committed to them, no pay or allowance in lieu of subsistence should be allowed.

The intention of Congress must be gathered from the language of the act taken as a whole, and its provisions are to be construed, if possible, so as to give proper force to each. In order that the provisions of section 10 may stand with those of sections 4 and 5, I am of opinion that it is necessary

to interpret them as authorizing the Director of the Census to "employ" special agents in the Census Office at Washington who have been appointed under section 7. The words "all employees of the Census Office," in section 5, can not be held to apply to special agents or other field employees who may be temporarily assigned to service in the Census Office here. What service such agents so assigned shall perform, and what shall be considered "clerical work," is for the Director to determine.

This construction of the act of 1902, while keeping the appointment of the regular permanent clerical force of the Census Office within the operation of the civil-service law, gives to the Director of the Census what I am constrained to believe Congress intended he should have, such discretion in the matter of employing special and temporary service as the character of the work intrusted to him may demand.

Respectfully,

JOHN K. RICHARDS,  
*Acting Attorney-General.*

THE SECRETARY OF THE INTERIOR.

---

CIVIL SERVICE—TRANSFER OF TEMPORARY CLERKS TO  
CLASSIFIED SERVICE.

Section 3 of the act of April 28, 1902 (32 Stat., 120, 171), which provides for the transfer to the classified service of the Government of certain temporary positions which were created to meet the exigencies of the war with Spain, exempts from examination such employees as filled these positions at the time of the passage of the act, and transfers the positions in question to the classified service. Subsequent vacancies must be filled in accordance with the laws and regulations governing appointments to the civil service.

DEPARTMENT OF JUSTICE,  
*June 23, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 20th ultimo, in which you ask my opinion as to the construction of section 3 of the act approved April 28, 1902.

The section in question provides for the transfer to the classified service of the Government of certain temporary positions which were created to meet the exigencies of the

recent war with Spain. The section continues the appropriation for their salaries, and provides that the clerks and employees in question—

“are hereby transferred to the classified service as of their present grade or rate of compensation, respectively, and shall be continued in the several departments where now employed, without further examination, subject, however, to transfer, promotion, or removal the same as other clerks and employees in the classified service.”

You are in doubt “as to whether the classification effected by said section 3 relates merely to the persons who were on the roll at the date of the approval of the act, or to both the persons and the places which they then filled.”

I am of the opinion that the latter view was the intention of Congress. The section contemplates the transfer of the positions in question to the classified service, but exempts from examination such employees as filled the positions in question at the time of the passage of the act. In bringing the places in question within the operation of the civil service laws, it sought to place their incumbents in the same position as though they had passed their examinations, and complied in other respects with the laws and regulations affecting the civil service. This personal exemption is limited to those who filled the positions in question at the time of the passage of the act, and does not extend to subsequent vacancies, which must be filled in accordance with the laws and regulations governing appointments to the civil service.

Respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

---

#### CONTRACT.

A contract for the building of a dry dock contained the provision that “the excavation shall be shored and protected from caving and injury in a manner which shall be safe and sufficient, in the opinion of the engineer in charge.” *Held:* The Government has a right to require that the land adjacent to the excavation, lying between the dry dock and a quay wall, be protected from caving and injury.

DEPARTMENT OF JUSTICE,

*July 2, 1902.*

SIR: I have the honor to acknowledge the receipt of your communication of June 28, requesting my opinion upon the

interpretation to be placed upon the provision (known as paragraph 40 of the specifications) in a contract for the building of a dry dock, that "the excavation shall be shored and protected from caving and injury in a manner which shall be safe and sufficient in the opinion of the engineer in charge," and particularly whether the Government has a right to require that the land adjacent to the excavation, and lying between the dry dock and the quay wall, be protected from caving and injury.

I am advised that the materiality of this inquiry arises from the contention of the contractors that the provision for shoring in the contract was for the protection of the excavation, and that the demand now made by the engineer of the Government upon the contractors to shore the excavation in conformity with plans furnished by him is for the protection of a quay wall, and that such work was not contemplated at the time the contract was executed.

By the statement of facts furnished me, it appears that a contract was entered into for the construction of a timber dry dock, which was afterwards modified so as to provide for stone and concrete construction. At the time of executing the first contract there was along the water front, opposite the site of the dry dock, a wooden wharf. This was removed and a quay wall built in its place for berthing vessels, to serve as a landing, and to prepare this portion of the water front and the land in the vicinity for the general uses of the navy-yard. This wall was practically completed when the modified contract was executed, and the plans for the changed dock showed it complete. The provision (paragraph 40) above referred to remained in the specifications of the modified contract.

Under the contract to construct the dry dock, excavation to a large amount and of great depth was required. It was contemplated that earth should be removed from a greater area than necessary for the dock. Consequently provision was made for refilling the spaces thus excavated.

The contract was to construct and complete the dry dock; and the Government covenanted to give possession and occupancy of the site and secure the same until the completion

of the work. The work was to be done under the supervision and inspection of a Government engineer.

In making the excavation the obligation rested upon the contractors to do no more than was necessary for the proper construction of the dock. Because they were permitted to go upon and use certain Government land, and because the Government was the owner of all the contiguous land, gave them no privilege to excavate improvidently or to endanger or injure the contiguous lands. Negligently removing or injuring the soil rendered them liable. Their general duty was to prevent caving or loss of the adjacent land; and this, whether it had structure upon it or not.

The provision requiring the excavation to be shored and protected from caving and injury in a manner which should be safe and sufficient is in accordance with these principles. It may be true that this was not primarily in the minds of the contracting parties; but it is also true that the requirement would be superfluous and incomplete if it were confined to the protection of the excavation. The contractors were obliged to keep that clear in order to build the dock, which they were to deliver to the Government, and which was not to be accepted and paid for until it was complete. Even so far as the excavation was concerned, the intent of the contracting parties was not that it should be protected by a greatly extended removal of the banks. The protection was to be by shoring, and it was expressed in this provision.

The terms of this specification are direct and plain. They are broad enough to cover protection to both the excavation and the adjacent lands. This shoring is to be done "in a manner which shall be safe and sufficient, in the opinion of the engineer in charge." The engineer has directed the work to be done according to a plan furnished. It was agreed by both parties that this officer should determine this matter. It was competent for them to so agree.

I do not consider it necessary for me to consider the question of the direct object had in view in ordering this work done. Upon the statements presented to me I am of the opinion that the Government has the right to require that the land adjacent to the excavation be protected from

caving and injury in the manner directed by the engineer in charge.

Very respectfully,

P. C. KNOX.

The SECRETARY OF THE NAVY.

---

ATTORNEY-GENERAL—OPINION.

It is not deemed necessary or desirable for the Attorney-General to express an opinion upon the question of granting extra compensation in lieu of annual leave to certain former employees of the Census Office, under a proviso to the deficiency appropriation act of June 30, 1902 (32 Stat., 571), that being a matter relating solely to payments out of the Treasury. By section 8 of the act of July 31, 1894 (28 Stat., 208), it is made the duty of the Comptroller of the Treasury to determine such questions.

DEPARTMENT OF JUSTICE,

*July 7, 1902.*

SIR: Your letter of July 3, inclosing a copy of a letter of the same date addressed to you by the Acting Director of the Census, presents certain facts and a question of law arising thereupon respecting the legality of extra compensation in lieu of annual leave to certain former employees of the Census Office, under a proviso to the deficiency appropriation act of June 30, 1902. The question in its ultimate effect thus relates solely to payments out of the Treasury. This is a matter which falls especially within the function of the Comptroller of the Treasury under section 8 of the act of July 31, 1894 (28 Stat., 162, 208), providing that certain officers of the Government, including the head of any executive department, may obtain the decision of the Comptroller upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller in passing upon the account in question.

In view of this law, and in accordance with various opinions of Attorneys-General, I have the honor to say that I do not deem it necessary or advisable for me to express



any opinion upon the question which you submit. (21 Opin., 188; 22 Opin., 413, 420; id., 581; 23 Opin., 468.)

Very respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

THE SECRETARY OF THE INTERIOR.

---

IMMIGRATION—HEAD TAX—PORTO RICO.

The head tax upon alien passengers brought into ports of Porto Rico should be accounted for and credited to the "immigrant fund," as is done with like collections upon alien passengers arriving at ports in the United States.

Section 14 of the act of April 12, 1900 (31 Stat., 77, 80), "to provide revenues and a civil government for Porto Rico," gives force and effect in that island to the immigration act of August 13, 1882 (22 Stat., 214).

DEPARTMENT OF JUSTICE,  
*July 15, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 28th ultimo, in which you ask for an opinion "as to whether, in view of the provisions of sections 4 and 14 of the act 'to provide revenues and a civil government for Porto Rico, and for other purposes,' approved April 12, 1900, the head tax upon alien passengers brought to ports of Porto Rico should not be accounted for and credited to the 'immigrant fund,' as is done with collections upon alien passengers arriving at ports of the United States under the provisions of 22 Stat., 214."

Said section 4 of the Porto Rican act, in substance, provided that prior to the organization of the government of Porto Rico "all collections of duties and taxes in the United States upon *articles of merchandise* coming from Porto Rico" should not be covered into the general fund of the Treasury, but should be held as a separate fund for the benefit of Porto Rico, and that after such organization all moneys theretofore collected under the provisions of said section, then unexpended, should be transferred to the local treasury of Porto Rico, and the Secretary of the Treasury should designate the several ports and subports of entry in Porto Rico, and make such rules and regulations and appoint

agents to collect the duties and taxes authorized to be levied and collected and paid in Porto Rico under said act; and said section further provided that upon the organization of a civil government for Porto Rico, and proclamation thereof by the President, all collections of duties and taxes in Porto Rico under the provisions of said act should be paid into the treasury of Porto Rico, to be expended as required by law for the government and benefit thereof.

It is apparent, from a critical examination of section 4 above referred to, that the duties and taxes therein mentioned are those levied and collected as such upon "articles of merchandise." Reference is made to ports and subports of entry, and to the making of rules and regulations, and appointment of agents to collect the duties and taxes authorized to be levied, collected, and paid in Porto Rico by the provisions of said act.

Under section 14, the statutory laws of the United States not locally inapplicable, except the internal-revenue laws, and except as otherwise provided, were given "the same force and effect in Porto Rico as in the United States."

Among the statutory laws of the United States "given force and effect in Porto Rico" by said act is "An act to regulate immigration" (22 Stat., 214), approved August 3, 1882. It will be observed from the title, and from a consideration of the provisions of said act, that its scope and purpose is not the raising of revenue, but the regulation of immigration. The duty of 50 cents exacted for each passenger is merely nominal, and in no way restricts immigration. The act provides that this duty shall be paid the collector of customs of the port to which such passenger shall come, or the collector nearest thereto, not by the immigrant, but by the master, owner, agent, or consignee of the steam or sailing vessel bringing such immigrant, and that "the money thus collected shall be paid into the United States Treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, under the direction of the Secretary of the Treasury, to defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States, for the relief of such as are in distress, and for the general purposes and

expenses of carrying this act into effect. \* \* \* *Provided*, That no greater sum shall be expended for the purposes hereinbefore mentioned at any port than shall have been collected at such port."

If section 14 of the Porto Rican act really gives "force and effect" to said immigration act in Porto Rico, the money collected thereunder must be paid into the United States Treasury, and devoted to the purposes designated in said act. Unless this is done, the purpose of the act is clearly defeated.

If this is done the spirit of section 4 will be carried out as well as the letter of section 14, for the money collected in Porto Rico under said immigration act will undoubtedly all be expended at the various ports in Porto Rico where it shall have been collected, and Porto Rico receive the benefit thereof.

Inasmuch as section 4 of the Porto Rican act evidently deals with duties and taxes levied and collected as such upon articles of merchandise, and section 14, by implication, gives force and effect in Porto Rico to said immigration act of August 13, 1882, and the head duty collected thereunder is a mere incident to and not the object of said act, and the diverting of such head duty from the purposes contemplated in said immigration act will evidently defeat the provisions of said section 14 of said Porto Rican act, so far as giving force and effect in Porto Rico to said immigration act is concerned, I am of the opinion that said head duty should "be accounted for and credited to 'the immigration fund,' as is done with collections upon alien passengers arriving at ports in the United States."

Respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

ARMY OFFICERS—APPOINTMENT.

Where A, an officer in the military service of the United States, was dismissed pursuant to the sentence of a general court-martial, which court, as it afterwards appeared, had no jurisdiction over the officer, and B was nominated to take his place on a certain date, "vice A, dismissed," which nomination was confirmed by the Senate, the appointment of B operated to supersede A, who ceased to be an officer after the date on which that appointment took effect.

DEPARTMENT OF JUSTICE,

*July 22, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 16th instant, in which you state that Hamilton H. Blunt was dismissed from the military service of the United States as a captain of the Forty-ninth Infantry, U. S. Volunteers, in pursuance of the sentence of a general court-martial which became operative by the approval of the President on January 2, 1901, and that Blunt has applied to your Department "for 'an adjustment of his record under the decision of the Supreme Court in the Deming case' and for a certificate of discharge." You ask: "On what date and by what act was the officer separated from the volunteer military service of the United States?"

It appears that under date of January 16, 1901, the President nominated to the Senate "First Lieut. William H. Butler, Forty-ninth Infantry, to be captain January 2, 1901, vice Blunt, dismissed;" that the nomination was confirmed January 21, and that he was on January 25, 1901, commissioned as captain, to rank from January 2, 1901.

It was recently held by the Supreme Court in *McClaghry v. Deming*, the case above referred to, that a court-martial organized to try an officer of volunteers, and composed in part of officers of the Regular Army, "had no jurisdiction over the person of the defendant or the subject-matter of the charges against him," and that the sentence imposed was for that reason void. The court-martial which tried Blunt, an officer of volunteers, having been similarly composed, was for the same reason without jurisdiction, and his sentence was also void.

The decision in the *Blake* case (103 U. S., 227) seems to determine the question here at issue. In that case Blake, a

post chaplain in the Army, on December 24, 1868, while insane, tendered his resignation, which was accepted by the President, to take effect March 17, 1869. On July 7, 1870, the President nominated to the Senate to be a post chaplain in the Army, to rank from July 2, 1870, "Alexander Gilmore, of New Jersey, vice Blake, resigned." Gilmore's nomination was confirmed July 12, 1870, and on the 14th of that month he was commissioned, to rank from July 2, 1870. Blake subsequently regained his reason, and on September 28, 1878, the President issued an order setting aside his resignation on the ground that he was insane when he tendered it, and ordering him to duty. Blake then brought suit in the Court of Claims to recover the amount claimed to be due him by way of salary as a post chaplain from April 28, 1869, to May 14, 1878. The case was taken by appeal to the Supreme Court. After stating the ground upon which Blake placed his claim, Mr. Justice Harlan, who delivered the opinion of the court, said (p. 230):

"Did the appointment of Gilmore, by and with the advice and consent of the Senate, to the post chaplaincy held by Blake, operate, *proprio vigore*, to discharge the latter from the service and invest the former with the rights and privileges belonging to that office? If this question be answered in the affirmative, it will not be necessary to inquire whether Blake was at the date of the letter of December 24, 1868, in such a condition of mind as to enable him to perform, in a legal sense, the act of resigning his office."

He then proceeded to consider the question, and his conclusion was as follows (p. 237):

"It results that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the Army from and after at least the date at which that appointment took effect, and this without reference to Blake's mental capacity to understand what was a resignation. He was, consequently, not entitled to pay as post chaplain after July 2, 1870, from which date his successor took rank."

Applying the decision in the *Blake case* to the case under consideration, the appointment of Butler, with the advice

and consent of the Senate, to the office held by Blunt, "operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the Army from and after at least the date at which that appointment took effect," and this without reference to the court-martial proceedings. As Butler was nominated and commissioned to take rank from January 2, 1901, it must be held that his appointment took effect from that date. It necessarily follows that Blunt was from the same date "separated from the volunteer military service of the United States."

Respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

The SECRETARY OF WAR.

---

CHINESE EXCLUSION—TREASURY DEPARTMENT CIRCULAR  
NO. 52.

Circular No. 52, Bureau of Immigration, Treasury Department, issued May 10, 1902, providing that duly registered Chinese laborers seeking admission to the United States after temporary absence under Article II of the treaty of 1894 between the United States and China must prove that some one of the conditions mentioned in that article exists at the time of application for readmission, is warranted both by the treaty with China and by the existing laws of the United States.

The facts which entitle such Chinese laborer to return to this country must exist not only at the time of his departure but also at the time of his return, and this notwithstanding the fact that he has obtained a return certificate.

DEPARTMENT OF JUSTICE,

*July 26, 1902.*

SIR: Your letter of June 24, inclosing a note from the Chinese minister dated June 14, presents for my opinion the question whether Circular No. 52, Bureau of Immigration, issued by the Treasury Department May 10, 1902, and relating to the enforcement of the Chinese exclusion law, is warranted by the treaty with China and the laws of the United States.

The circular provides that registered Chinese laborers seeking admission to the United States after temporary absence under Article II of the treaty of 1894 between the

United States and China must prove that some one of the conditions mentioned in Article II exists at the time of application for readmission. The circular states that such proof "constitutes a condition precedent to reentry of such persons additional to the return certificate prescribed in section 7 of the act approved September 13, 1888." The following rules and conditions are prescribed: That return certificates may be issued to duly registered Chinese laborers upon *prima facie* evidence that they possess some one of the grounds recited in the act of 1888 to sustain their claim of right to return; that a return certificate does not relieve the holder of the necessity of proving to the satisfaction of the appropriate officers upon return to the port of departure that some one of the conditions of Article II exists at the time of return; that every Chinese laborer to whom a return certificate has been issued should be informed that, in order to avoid the risk of being refused readmission, he should, ninety days in advance of his return, notify the collector of customs at the proper port of the intention to return, giving the facts regarding his personal identity and the grounds upon which he claims the right to reenter.

The remaining paragraphs of the circular provide that the collector shall, upon receipt of such notice, investigate the claim, and if its validity is not established, shall notify the person making it that he will not be permitted to reenter this country; and that upon the arrival of a returning laborer and the exhibition of his return certificate, the collector shall require the applicant to establish satisfactorily that he has at the time of arrival a lawful wife, child, or parent in the United States, or property therein of the value of \$1,000, or debts of like amount due him and pending settlement. Provision is made for entry without delay, if evidence of the applicant's eligibility has previously been secured and is not controverted, but otherwise a landing shall be refused until the applicant's right is established.

The gist of the representations on behalf of Chinese persons is that the existing law and practice contemplates the possession of a return certificate as conclusive evidence of the right; that there is no warrant for the position of the

circular that the conditions of allowance of reentry must exist at the time of return as well as at the time of departure when the certificate is obtained. The statement of this proposition is almost sufficient in itself to condemn it. Accompanying it is some concession that fraud discovered after the certificate was issued might invalidate it. But the claim is made that the certificate is not *prima facie* evidence but the sole evidence of the right of the laborer to return. The argument necessarily means that, provided a registered laborer possessed the proper qualifications to entitle him to return at the time of leaving this country, although as soon as he had left, by fortuitous occurrence, or design, short of fraud, all of those qualifications were withdrawn by the departure of his family from this country and the collection and remittance of his property or debts to China, yet the certificate of the necessary facts which previously existed would be a sufficient charter for his right to reenter.

The act of 1888 in its sixth section states the same basis for the right of return as the treaty of 1894, and there is nothing in the seventh section of that act providing for return certificates which makes the issue of the certificate the final determination of the right, or which is inconsistent with the view that the facts constituting the foundation of the right must exist when the applicant actually returns to this country as well as when he applies for the certificate.

Article I of the treaty of 1894 prohibits the coming of Chinese laborers to the United States. The first sentence of Article II is as follows: "The preceding article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of \$1,000, or debts of like amount due him and pending settlement." The remainder of Article II specifies the conditions upon which the Chinaman must obtain a certificate and exercise the right of return. The language quoted makes it very evident that the existence of the crucial facts relates to the time of return. They must exist also at the time of departure, in order to enable the Chinaman to obtain a certificate; but manifestly there is no meaning or purpose in the allowance granted except as giving an actual and existing reason



for a Chinaman's reentry into the country. The law does not provide that the prohibition shall not apply to the return of a laborer who *had*, but who *has*, a lawful wife, child, etc.

Consideration of the essential character of the exception granted and of the reasons for it enables us to say that the requirement of application for a return certificate a month prior to departure (sec. 7, act of 1888, *supra*), to enable the collector to investigate, constitutes no reason for holding that no other examination was ever intended to be made. The right is carefully guarded against abuse. Before the apparent title to it is conferred, due investigation is made; and manifestly the right should be shown by satisfactory proof to be still possessed by the applicant when he actually arrives here on his return voyage.

Paragraph III of the circular, suggesting rather than requiring that a returning laborer should notify the collector from China in advance of his intention to return, is plainly for the convenience of the Chinaman, and to save him from loss and disappointment. This provision was dictated by consideration for the Chinese, and the suggestion is not just that the benefit and convenience to them is doubtful; that the rule really subjects Chinamen to an adverse investigation in their absence, with no opportunity to refute false charges or the machinations of enemies. In any *bona fide* case adverse influences, if, indeed, such should exist, would be powerless to prevent the establishment before the appropriate Government officers of such patent facts as the necessary family relations or property ownership.

In view of all the foregoing considerations, I have the honor to advise you that in my opinion, as a matter of law, the circular in question is warranted by the treaty with China and existing laws of the United States.

Very respectfully,

HENRY M. HOYT,  
*Acting-Attorney-General.*

The SECRETARY OF STATE.

CIVIL SERVICE—DEPARTMENT OF STATE.

Section 3 of the legislative, executive, and judicial appropriation act of April 28, 1902 (32 Stat., 120, 171), did not operate to place in the classified service certain stenographers and a laborer who had been employed by the Department of State since 1898 under succeeding yearly appropriations providing \$2,000 annually "for temporary typewriters and stenographers" in that Department, the same "to be selected by the Secretary."

That provision applied only to war-emergency employees who had been repeatedly recognized, designated, and continued in employment in yearly appropriation acts as an "additional temporary force rendered necessary because of increased work incident to the war with Spain."

DEPARTMENT OF JUSTICE,

*July 29, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 10th instant transmitting "copy of a letter from the Civil Service Commission expressing the opinion that Caroline C. Galbreath and Kathryn Sellers, temporary stenographers and typewriters, and Edmund A. Burrill, temporary laborer engaged in messenger work, were not brought into the classified service by section 3 of the 'Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1903, and for other purposes'" (approved April 28, 1902). You desire my opinion as to the status of these employees.

At the time Congress passed the appropriation act above referred to there were in the employ of the Government hundreds of capable and efficient men and women whose appointment the exigencies of the situation had led Congress to authorize without compliance with the civil-service law. It was found that the growth of the business of the Government rendered necessary the continuance of these employees in the service, and it was probably the intent of Congress to extend to all such employees, under the authority of said section 3, the benefits of classification under the civil service. No reason apparently existed why Congress should have neglected to extend the privileges of said section 3 to the persons named in your letter. There is grave doubt, however, whether this was done.

The sundry civil act approved July 1, 1898, under the heading of appropriations for the State Department, contained the following: "Office of the Secretary; for temporary typewriters and stenographers in the Department of State, to be selected by the Secretary, two thousand dollars, to be immediately available." The same appropriation was made, in the same language (except that the words "to be immediately available" were thereafter omitted), in the legislative, executive, and judicial appropriation acts of 1899, 1900, 1901, and 1902.

Attorney-General Griggs, in passing upon your authority to make appointments under said appropriation of July 1, 1898, without reference to the civil-service rules, said (22 Opin., 557):

"I think the original appointment of Mrs. Galbreath as a temporary clerk in the Department of State, without reference to or conformity with the proceedings directed to be complied with where appointments are made to positions in the classified service, was lawful. The language of the appropriation act above quoted indicates that the object of Congress was to provide for extraordinary and unusual services which were only temporarily required. The appropriation designates no number of stenographers and typewriters which the Secretary may employ, leaving it to his discretion to employ one or two if the exigencies of the service and the necessity of speedy action required, or a much larger number if in the judgment of the Secretary a larger number would better facilitate the work. The only limit on the discretion of the Secretary is the amount of the expenditure for this purpose, which is fixed at \$2,000. The appropriation clause does not create offices or positions, but merely provides for temporary employment."

He also held that the appointment of Mrs. Galbreath to the permanent service under authority of the amendment to the civil-service rules of May 29, 1899, authorizing the permanent employment of persons serving under temporary appointments, was unauthorized.

Said section 3 of said appropriation act of April 28, 1902, provides:

"That the additional clerks on the temporary rolls and

other employees rendered necessary because of increased work incident to the war with Spain, and under the act of June thirteenth, eighteen hundred and ninety-eight, providing for war expenditures and for other purposes, heretofore appointed and who are now employed in the several departments of the Government, are hereby transferred to the classified service as of their present grade or rate of compensation, respectively, and shall be continued in the several Departments where now employed, without further examination, subject, however, to transfer, promotion, or removal the same as other clerks and employees in the classified service."

Congress had theretofore repeatedly recognized and designated a class of war emergency employees in the various Departments by making appropriations from year to year "for continuing the employment of such additional temporary force rendered necessary because of increased work incident to the war with Spain." In said appropriation act of April 28, 1902, the war emergency employees in the Treasury, War, and Post-Office Departments are all referred to as such.

Where Congress has provided that a certain class of employees shall have certain benefits and privileges, and it is found that these employees have been designated by a particular phrase, all others are necessarily excluded. Each appropriation "for temporary typewriters and stenographers in the Department of State, to be selected by the Secretary," was separate and distinct and independent of the one preceding it. The second and subsequent appropriations were not made, as were the appropriations for the war emergency force, "for continuing" such typewriters and stenographers.

Under said appropriation of April 28, 1902, you undoubtedly have the authority to make appointments without compliance with the civil-service law. This of itself is inconsistent with the theory that the persons now holding positions under that appropriation are entitled to the benefits of said section 3.

What has been said of persons holding appointments

under said appropriation for temporary typewriters and stenographers is equally true of an employee "paid from the appropriation for emergencies arising in the diplomatic and consular service."

Referring to the employees named in your letter, you say:

"These persons were taken into the service of the Department during the Spanish-American war; the growth of the business of the Department has rendered their continued service necessary, and they have shown themselves highly capable of performing the duties which are assigned to them. In view of the fact that it would be difficult to find persons so competent to render the service they are rendering, \* \* \* it is believed by the Department that their services ought to be retained."

Under all the circumstances, the authority of the President to bridge an apparent omission of Congress may seem to you proper to be invoked.

Respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

THE SECRETARY OF STATE.

STATUTORY CONSTRUCTION—REFUNDING OF LEGACY TAXES.

There is no distinction in the meaning of the terms "vested" in the first paragraph, and "vested in possession or enjoyment," in the second paragraph of section 3 of the act of June 27, 1902 (32 Stat., 406) which provides for the refunding of taxes paid upon legacies and bequests for religious uses, etc., under the act of June 13, 1898 (30 Stat., 464).

The two expressions should be given their technical legal significance in each paragraph. The words "vested in possession or enjoyment" do not imply an actual physical possession, but mean merely that the contingency had been removed prior to July 1, 1902.

DEPARTMENT OF JUSTICE,  
*August 1, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 23d ultimo, asking for my opinion "as to the proper construction to be given section 3 of the act approved June 27, 1902, entitled 'An act to provide for refunding

taxes paid upon legacies and bequests for uses of a religious, charitable, or educational character, for the encouragement of art, and so forth, under the act of June thirteenth, eighteen hundred and ninety-eight, and for other purposes.'”

Said section 3 reads as follows:

“That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled ‘An act to provide ways and means to meet war expenditures, and for other purposes,’ and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two.”

The first paragraph of said section authorizes the refunding of all taxes paid on contingent beneficial interests that had not become vested prior to July 1, 1902. The second paragraph directed that no tax be “assessed” or “imposed” after the passage of said refunding act (approved June 27, 1902) upon any contingent beneficial interest not “absolutely vested in possession or enjoyment prior to said July 1, 1902.” The words “contingent” and “vested” should be given their technical legal significance in each paragraph.

In the first paragraph no tax *paid* on a contingent interest can be legally refunded where that interest vested prior to July 1, i. e., where the contingency upon which the interest was conditioned happened before that date.

In the second paragraph no tax could be legally demanded after June 27, 1902, upon a contingent interest, unless the

contingency had been removed and the interest vested prior to July 1 of that year.

Replying to your specific inquiry, I am unable to conclude that Congress intended to make any distinction between the use of the terms "vested" in the first paragraph, and "vested in possession or enjoyment" in the second paragraph of said section. In each case the subject of exemption was the same, viz, contingent interests in the technical legal sense, and the only difference between them was that in the one case the tax having been paid a refund is provided, and in the other case its imposition is forbidden. I can not think that the words, "vested in possession or enjoyment," imply an actual physical possession of the subject of the legacy, for if Congress had so intended it would have enabled anyone whose interest had become vested, and therefore assignable, to avoid the tax by postponing the physical possession of the interest. Both with respect to the taxes paid, or to be assessed, the law sought to exempt contingent interests which might never vest, and the words "vested in possession or enjoyment," therefore, reasonably mean that the contingency had been removed prior to July 1, 1902.

Respectfully,

JAMES M. BECK,  
*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

#### WIRELESS TELEGRAPHY—INTERNATIONAL AGREEMENT.

The United States have power, either alone or in cooperation with other countries, to impose conditions upon the operation of any wireless telegraph system which conveys messages to or from the United States. Such transmission is commerce, and the power of the United States to regulate commerce and to preserve the territorial integrity of this country does not depend upon the means employed but upon the end attained.

DEPARTMENT OF JUSTICE,  
*August 18, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 18th ultimo, transmitting "copy of a confidential memorandum from the general embassy suggesting an international arrangement to prevent the English Marconi

Company from obtaining a monopoly of wireless telegraphy," and also a copy of your reply, summarizing the answer of the Treasury, War, and Navy Departments to the proposal.

You ask for my opinion "on the legal questions involved, so far as this Government is concerned," and for "legal suggestions as to the regulations proposed to be submitted to a preliminary conference."

The power of the United States, either alone or in cooperation with other countries, to impose conditions upon the operation of any wireless telegraph system which conveys messages to or from the United States is perfectly clear. Such transmission has been repeatedly held by the Supreme Court to be commerce, and, therefore, within the plenary and paramount authority of the Federal Government to regulate, whether such commerce be foreign or interstate.

Apart from this specific clause of the Constitution, I may refer you to the carefully considered opinion of this Department (22 Opin., 13), in which the inherent authority of the President to control the landing of foreign submarine cables on the shores of the United States was set forth. The conclusions therein reached are not affected by the means employed to transmit messages, for whether transmitted by the ordinary telegraph wires, by submarine cables, or by any of the wireless systems, the power of the Government to regulate commerce and to preserve the territorial integrity of this country depends not upon the means employed but upon the end attained.

Whether the United States should participate in an international conference to regulate wireless telegraphy is an administrative question upon which I am not called to express an opinion. If your Department should reach the conclusion to participate in such a conference, and desires to formulate propositions for its consideration in behalf of the United States, I am willing, if desired, to express an opinion, upon their submission to me, as to their legal sufficiency.

Respectfully,

JAMES M. BECK,  
*Acting Attorney-General.*

THE SECRETARY OF STATE.



## ATTORNEY-GENERAL—OPINION.

It is the invariable rule of the Department of Justice to decline to give an opinion except when the request is accompanied by a statement or finding of the facts involved.

DEPARTMENT OF JUSTICE,

*August 27, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 26th instant, inclosing certain correspondence between the officers of your Department and the Pacific Mail Steamship Company, as well as certain communications submitted on behalf of the Sailors' Union of the Pacific, and in which you ask my opinion upon the following questions:

(1). "Is not the proposed transfer of the said Chinese seamen, under the circumstances mentioned in the accompanying correspondence, such a landing as would bring them within the provisions of the treaty and laws in relation to the exclusion of Chinese?"

(2) "If the transfer contemplated may be made without violation of the said laws, would it not be in pursuance of a contract or agreement such as that prohibited by section 1 of the act of February 26, 1885 (23 Stat., 332), and the acts amendatory thereto, known as the alien contract-labor laws?"

You do not give me, as the basis for an opinion, any agreed statement of facts, but on the contrary ask for an expression of my opinion upon facts to be gathered from the inclosures of your letter. It has been the invariable rule of this Department to decline to give an opinion except when the request is "accompanied by a statement or finding of the facts involved." (23 Opin., 331, and previous opinions there cited.)

I am therefore reluctantly constrained to decline to express any opinion.

I return you the inclosures of your letter.

Respectfully,

JAMES M. BECK,

*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

## CIVIL SERVICE—REINSTATEMENT.

A person formerly employed as a clerk in the temporary or Spanish war force, who resigned September 30, 1901, can not, by virtue of section 3 of the act of April 28, 1902 (32 Stat., 120, 171), which transferred these temporary positions to the classified service, be reinstated without examination.

The question whether such person is eligible to be reinstated under rule 9 of the Civil Service Regulations depends upon the date of the requisition. If the position was within the classified service at the date of the requisition, then such person is eligible.

The word "may" in rule 9 vests a discretion in the Commission. The question of reinstatement is one of administrative discretion, and is not to be granted except when consistent with the interests of the public service.

## DEPARTMENT OF JUSTICE,

*August 27, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of August 25, 1902, in which you ask me to submit an opinion in the case of Mrs. Marian K. Rogers, who is an applicant for reinstatement in the War Department under the following circumstances: The applicant, on January 2, 1898, was appointed a clerk in the temporary or Spanish war force of the War Department, appointments to which, under the act of Congress, were to be made without compliance with the civil-service rules. On September 30, 1901, she resigned.

By section 3 of the act of April 28, 1902, these temporary positions were transferred to the classified service, and the employees who then filled them were placed in the same position as though they had complied with the laws governing the civil service. As I held, in an opinion under date of June 23, 1902, "this personal exemption is limited to those who filled the positions in question at the time of the passage of the act." As Mrs. Rogers had surrendered her position prior to the passage of the act she can not, by the force of its provisions, claim the personal exemption therein provided. The positions, however, being brought within the operation of the civil-service laws "must be filled in accordance with the laws and regulations governing appointments to the civil service." The question therefore arises whether she

is eligible for reinstatement under rule 9 of the Civil Service Regulations, which provides as follows:

“A vacancy in any position which has been, or may hereafter be, classified under the civil-service act, may, upon requisition of the proper officer and the certificate of the Commission, be filled by the reinstatement, without examination, of any person who, within one year next preceding the date of said requisition, has, through no delinquency or misconduct, been separated from a position included within the classified service at the date of said requisition, and in that department or office and that branch of the service in which said vacancy exists.”

Mrs. Rogers's eligibility for reinstatement, therefore, depends upon the date of the requisition. If the position to which she desires to be reinstated was within the classified service at the date of the requisition, then she is eligible under rule 9. But if, on the contrary, the requisition was made prior to the act of April 28, 1902, which brought the position in question within the classified service, then, in my opinion, rule 9 is without application.

You further ask me to submit an opinion as to whether the word “may,” as used in rule 9, vests a discretion in the Commission as to such reinstatement. Ordinarily the use of the word “may” in legal regulations imports such discretion, although at times it is used without such meaning, especially in cases where an exception to a previous rule is being noted. In examining the civil-service rules it would appear that the words “shall” and “may” have generally been used advisedly to distinguish between that which is mandatory and that which is discretionary. Thus section 4 of rule 7 provides that “the term of eligibility *shall* be one year from the date on which the name of the eligible is entered on the register: *Provided*, That this term *may* be extended, *in the discretion of the Commission*, for a further period of one year from the date of the expiration of the first year's eligibility, upon such conditions as the Commission may prescribe: *And provided further*, That in case a person whose name is upon any register shall be mustered into the military or naval service of the United States at a time when the United States may be engaged in war, the

period of eligibility of such person *shall*, under such conditions as the Civil Service Commission may prescribe, be considered as suspended during the time such eligible may be serving in the Army or Navy of the United States."

Without enumerating the numerous instances in which the words "shall" and "may" are used, and without committing myself to the interpretation of these words in any rule except that now under discussion, it would thus appear that the word "may" has been used advisedly in framing these regulations. The rule now under consideration provides that—

"A vacancy in any position which has been, or may hereafter be, classified under the civil-service act, may, upon requisition of the proper officer and the certificate of the Commission, be filled by the reinstatement, without examination, of any person who, within one year next preceding the date of said requisition, has, through no delinquency or misconduct, been separated from a position included within the classified service at the date of said requisition, and in that department or office and that branch of the service in which said vacancy exists."

That the word "may," as thus used, was intended to vest a discretion, is indicated by the fact that the reinstatement is not without conditions, but is dependent upon the fact that the applicant was not separated from the position which he formerly occupied by any "delinquency or misconduct." Such reinstatement, therefore, depends upon the good of the service, and for this reason the word "may" was used.

I am, therefore, of the opinion that, without respect to whether the applicant's retirement from the service was for either delinquency or misconduct, the question of reinstatement is one of administrative discretion, and not to be granted except when consistent with the interests of the public service.

Respectfully,

JAMES M. BECK,  
*Acting Attorney-General.*

The PRESIDENT.

UNITED STATES SUPREME COURT REPORTS—DISTRIBUTION.

Section 1 of the act of July 1, 1902 (32 Stat., 630), entitled "An act for the further distribution of the reports of the Supreme Court, etc.," authorizes the distribution of the *official edition* only of those reports, together with reprints of such earlier volumes as are out of print or are otherwise difficult to procure.

A reprint distinguished from a new edition.

Under section 2 of that act the circuit and district judges are authorized to select the editions, whether official or otherwise, for their respective courts, provided that no volumes of the reports have been previously furnished such court.

This right of selection is limited to judges of the circuit and district courts, and does not extend to the other distributees mentioned in section 2. It is also limited to the copies to be supplied for the courts, and does not include reports intended for the individual use of the judges.

The copies to be distributed under section 3 are to be furnished by the publishers of the official reports.

By section 4 the digests are to be distributed to each judge or other official entitled to receive the decisions, either under the act of July 1, 1902, or prior legislation.

DEPARTMENT OF JUSTICE,

*August 27, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 5th instant, in which you ask my interpretation of the act approved July 1, 1902, entitled "An act for the further distribution of the reports of the Supreme Court, and for other purposes."

As to this act, you ask me the following questions:

(1) "Whether this Department is at liberty to distribute to any of the executive and judicial officers of the Government named in section 1 any other than the *official* edition or an exact reproduction of said official edition."

(2) "What is the legal import of the word 'reprint,' as used in section 2."

(3) "Whether the option given in section 2 as to the edition from which the reports are to be supplied applies to any other officers than the judges holding courts, or does it extend to the heads of the Naval and Military Academies and to the Secretary of War."

(4) "Whether such option includes the reports that are to be supplied to United States judges for their individual use,

or is it limited to such reports as are to be 'distributed to each of the places where circuit and district courts of the United States are now holden,' which reports are to be kept in the custody of the clerks of said courts."

(5) "Whether, in procuring the reports to be supplied under the provisions of section 3, the Department is limited to those furnished by the same publisher, viz, the publisher of the official edition, by whom all reports received by this Department have been hitherto supplied, or can the Department procure them from some other publisher of the decisions of the Supreme Court. If the latter, who is to decide which publisher shall furnish the decisions."

(6) "Whether the digest referred to in section 4 is to be distributed to the several executive officers of the Government entitled to the reports of the Supreme Court under this act or prior laws, or only to judges and to places where United States courts are holden."

The first two questions can be answered together. The act of July 1, 1902, was supplementary to previous legislation with reference to the distribution of the official reports of the Supreme Court, and must, therefore, be construed in harmony with prior legislation. Section 677, Rev. Stat., authorizes the Supreme Court to appoint an official reporter; and section 681 requires the reporter to deliver to the Secretary of the Interior 300 copies of his work; section 683 provides for the distribution of these copies. By the act of February 12, 1889, provision was made for "the distribution, by the Secretary of the Interior, of one set of the official reports of the decisions of the Supreme Court, or an exact reprint of the same, comprising volumes one to one hundred and twenty-two, inclusive, or so many volumes as may be needed with those already supplied to make one such set, to each of the places where the circuit and district courts of the United States are regularly held." It is clear that this contemplates the distribution of the official reports of the Supreme Court. It is true that the words "or an exact reprint of the same" are used, but in my judgment this had reference to the reprint of the earlier volumes. It is well known that many of the volumes prior to 1860, as originally printed, can not be procured except from private libraries,

and that it has been necessary to make reprints of the same in order to supply the needs of the bench and bar. Congress presumably knew this fact when it provided for the distribution of the decisions from volumes 1 to 122. It appreciated that it might be difficult to procure many of the earlier volumes in the original edition, and therefore permitted the Secretary of the Interior to supply the deficiency by the reprints of the original reports. With this exception, however, Congress intended to supply the volumes for which provision had been made in the sections of the Revised Statutes to which I have referred.

Such being the state of the law, Congress passed the act of July 1, 1902, entitled "An act for the further distribution of the reports of the Supreme Court, and for other purposes." Section 1 enlarged the number of officials to whom such copies should be given, and in my judgment there was no intention to change by this section the provisions of previous laws with respect to the character of the publication to be furnished. This section clearly contemplates the distribution of the "Official Reports of the Supreme Court of the United States." And while the words "or a reprint of the same" are added, yet in my judgment they are used with the same meaning as in the act of February 12, 1889. While a reprint of the official reports of the Supreme Court need not be a fac-simile, yet it is not a reprint unless it contains the same matter as the official edition. The official edition contains more than the opinion of the court. It contains a preliminary statement of facts, which is often prepared by the justices, a syllabus and headline, indices, and occasionally foot notes. At times it contains addresses made on the occasion of the death of members of the court, and unless the so-called "reprint" contains all of these, it is not, in my judgment, a reprint, even though it reproduces *verbatim et literatim* the text of the decisions. As I understand it, there are editions of the Supreme Court reports other than the official edition, and these contain the opinion of the court, with different syllabii, indices, paging, annotations, and other matter. The volumes have a different serial number. These are a separate edition, and therefore, in the very nature of the case not a reprint, for ordinarily an

edition implies an editor, and an editor implies some distinctive and original treatment of the subject-matter. There is a clear distinction between a reprint of the first folio of Shakespeare and the various editions of Shakespeare with which learned commentators have enriched literature.

For the reasons stated I am of the opinion that section 1 only authorizes you to distribute the official edition of the Supreme Court reports, together with reprints of such earlier volumes as are out of print or otherwise difficult to procure.

Your third question as to the option given in section 2 is more difficult. The section reads:

“That the Secretary of the Interior shall likewise distribute to each of the places where circuit and district courts of the United States are now holden, including the Indian Territory, islands of Hawaii and Porto Rico, to which they have not already been supplied under the provisions of the act of Congress approved February twelfth, eighteen hundred and eighty-nine, and to the Naval Academy at Annapolis and to the Military Academy at West Point, one complete set of the reports of the Supreme Court, including those already published and those hereafter to be published, or a reprint of the same, or such volumes as with those already furnished will make one complete set, the judges holding such courts to select the edition of such reports to be supplied for such courts; and he shall also distribute to the Secretary of War twelve complete sets for the use of the proper courts and offices of the Philippine Islands and of the headquarters of military departments in the United States, in his discretion, and to each and every place where a new circuit and district court may be hereafter established one complete set of said reports; and the clerks of said courts shall, in all cases, keep these reports for the use of the courts and the officers thereof: *Provided, however,* That no distribution of reports under this section shall be made to any place where the court is not held in a building owned by the United States, or where there is no United States officer to whose responsible custody they can be committed.”

I have already called attention to the fact that there is a clear distinction between a reprint and a different edition.



Congress presumably knew that there were editions of the Supreme Court reports other than the official edition, and with this knowledge it empowered "the judges holding such courts to select the edition of such reports to be supplied for such courts." I can not believe that the word "edition" is here used synonymously with the word "reprint." The more reasonable construction is that Congress believed that some of the judges might prefer other editions than that of the official reporter, and therefore gave to the judges a right of selection. Such right, however, can only refer to courts where a complete set is to be furnished, for where a part of the decisions has previously been furnished, the additional volumes to be furnished must be such as "will make a complete set." Congress did not intend to break the harmony of existing sets by supplying later volumes of a different edition, even though requested to do so by the judges referred to in section 2. I think, therefore, Congress meant that where no volumes had been previously furnished, the Secretary of the Interior should furnish such edition, whether official or otherwise, as the judge might desire. This right of selection was limited to judges of the circuit and district courts, and had no reference to the other distributees mentioned in section 2.

Answering your fourth question, I am of the opinion that the right of selection was further limited to the copies to be supplied for the courts. The language extends no further.

Replying to your fifth question, the copies to be furnished to you under the act of July 1, 1902, are to be furnished by the publishers of the official reports to the extent of the number therein mentioned. Such is the express language of the provision.

Replying to your sixth question, the language of section 4 is not entirely clear, yet in my judgment it was the intention of Congress to distribute the digests to each judge or other official entitled to receive the decisions of the court, either under the act of July 1, 1902, or of prior legislation.

I return you the inclosures of your letter.

Respectfully,

JAMES M. BECK,

*Acting Attorney-General.*

THE SECRETARY OF THE INTERIOR.

NAVIGATION LAWS—CONTRACT LABOR—CHINESE EXCLUSION.

A Chinese crew which shipped at Hongkong on a vessel belonging to a company chartered under the laws of the United States, for a trip to San Francisco and return by the same vessel or any other vessel belonging to that company, which crew, owing to an accident to the ship, was brought to San Francisco on a vessel belonging to a different company, may be transferred to another vessel substituted for the one injured, after having duly signed for that service before a United States shipping commissioner.

Such transfer would not be a violation of the alien contract labor laws. The landing of the crew, temporarily, for the purpose of transfer, would not violate the treaty with China and the laws of the United States in relation to the exclusion of Chinese.

DEPARTMENT OF JUSTICE,

*August 29, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 28th instant, together with the papers therein referred to.

It appears that a Chinese crew was shipped on the *City of Peking*, a vessel of the Pacific Mail Steamship Company, chartered under the navigation laws of the United States on or about July 22 last, at Hongkong, for a trip from said port to San Francisco and return, the shipping articles signed by said crew stipulating for the return voyage by the *City of Peking* "or any other vessel of the same company in the trans-Pacific trade." On her voyage to San Francisco the *City of Peking* was disabled and was towed into Kobe, Japan, for repairs. Her crew were put upon the *Gaelic*, of the Occidental and Oriental Company, chartered under the navigation laws of Great Britain, by which vessel they were brought to San Francisco. The Pacific Mail Steamship Company now desires to transfer said Chinese crew to the *Korea*, which vessel has been substituted for the *City of Peking*, for the return voyage to Hongkong.

My opinion is requested upon the following questions:

"First. Would such shipping articles as those above described enable the Pacific Mail Steamship Company to transfer a crew signed in a foreign port for service on one of its vessels to another of its vessels about to make its initial voyage from a port of the United States to serve as crew

thereof, without duly signing said crew for the last-named service before a United States shipping commissioner?

"Second. If such transfer could be made without the said crew being first duly signed for service on the *Korea* before a United States shipping commissioner at the port of San Francisco, would it not be a violation of the act of February 26, 1885 (23 Stat., 332), and the acts amendatory thereof, known as the 'alien contract-labor laws'?"

"Third. Would not the landing of the Chinese persons constituting said crew, who now are merely passengers on a vessel of the said Occidental and Oriental Line, even temporarily for the purpose of the transfer above described, be in violation of the treaty and laws in relation to the exclusion of Chinese, since they are without the evidence prescribed for persons of that race of the classes excepted by Article III of the convention of December 8, 1894, and without the certificates of registration and return required of Chinese laborers?"

1. Section 20 of the act of June 26, 1884 (23 Stat., 58), provides that "every master of a vessel in the foreign trade may engage any seaman at any port out of the United States, in the manner provided by law, to serve for one or more round trips from and to the port of departure, or for a definite time, whatever the destination; and the master of a vessel clearing from a port of the United States, with one or more seamen engaged in a foreign port, as herein provided, shall not be required to reship in a port of the United States the seamen so engaged."

This section authorizes the shipment abroad on a vessel chartered under the laws of the United States of a crew for a trip from a foreign port to a port of the United States and return. But, although the language used is not specific on the subject, it is evident that the section contemplates the return of the crew to the foreign port of departure in the vessel in which they shipped. In the present case, the shipping articles provided that the crew, outbound from Hong-kong on the *City of Peking*, should return thereto either on that vessel or on some other vessel of the company in the trans-Pacific trade. Had not the accident happened to the *City of Peking*, there would be no question as to the author-

ity, under this section, for the return of the crew upon that vessel to Hongkong. The question then arises whether, because of the accident and the resulting transfer to the *Gaelic* of the crew of the *City of Peking*, by which they reached San Francisco, they can serve as the crew of the *Korea* without signing for such service before a United States shipping commissioner.

Section 4511 of the Revised Statutes provides that "the master of every vessel bound from a port in the United States to any foreign port \* \* \* shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this title. \* \* \*"

As the act of June 26, 1884, contemplates the return upon the *same* vessel of a crew shipped in a foreign port for a round trip, it would seem proper, in the absence of express authority to transfer the crew to another vessel, to require compliance with section 4511, Revised Statutes, when such transfer is sought to be made. I therefore answer your first question to the effect that the transfer of the crew of the *City of Peking* to the *Korea* may be permitted when they shall have duly signed for the return voyage to Hongkong, in accordance with their contract, before a United States shipping commissioner.

2. Answering your second question, I am of opinion that the alien contract-labor laws have no application to Chinese or other foreign seamen. It can not be supposed that Congress by the act of February 26, 1885 (23 Stat., 332), and the acts amendatory thereof, intended to repeal the provision of the act of June 26, 1884, before referred to. Had Congress so intended, its intention would have been clearly manifested, and not left to be gathered by implication from acts which have reference to entirely different subjects—the one relating to navigation and the other to the protection of labor within the United States.

In the case of the *United States ex rel. Anderson v. Burke* (99 Fed. Rep., 895, 898), which involved the construction of

the immigration laws, the circuit court for the southern district of Alabama, after observing that all laws should receive a reasonable construction, and that "a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers," said:

"A consideration of the whole legislation on the subject of alien immigration, of the circumstances surrounding its enactment, and the unjust results which would follow from giving such a meaning to it as is here claimed for it, makes it unreasonable to believe that Congress intended to include a case like the present one. My opinion is that these statutes do not contemplate the exclusion of the crews of vessels which lawfully trade to our ports, and that they do not, in spirit or in letter, apply to seamen engaged in their calling, whose home is the sea; who are here to-day and gone to-morrow; who come on a vessel into the United States with no purpose to reside therein, but with the intention, when they come, of leaving again on that or some other vessel for the port of shipment or some other foreign port in the course of her trade. To hold that these statutes apply to aliens comprising the bona fide crews of vessels engaged in commerce between the United States and foreign countries would lead to great injustice to such vessels, oppression to their crews, and serious consequences to commerce." (See also 23 Opin., 521.)

The principle thus announced applies to the alien contract-labor laws.

I therefore answer your second question to the effect that the alien contract-labor laws would not be violated by the transfer of the crew of the *City of Peking* to the *Korea*.

3 In the case of *In re George Moncan* (14 Fed. Rep., 44, 47), where the question was whether certain Chinese members of the crew of the *Patrician*, of Maine, shipped before the American consuls of London and Yokohama respectively, were within the United States in violation of section 1 of the act of May 6, 1882, the circuit court for the District of Oregon said:

"Nor do I think that the Chinese members of the crew of the *Patrician* are 'laborers' within the meaning of this act. True, their vocation is labor. But they are not brought

here to remain and enter into competition with the labor of the inhabitants of the country. They labor upon the high seas in the navigation of a vessel engaged in the exchange of commodities between this country and other parts of the world. \* \* \*

"It is not to be supposed for a moment that Congress intended by the passage of this act to impede or cripple this commerce by prohibiting, in effect, all vessels engaged in the carrying trade to and from the United States, and particularly those on the Pacific coast, from employing Chinese cooks, stewards, or crews, when, for any reason, it is necessary or convenient to do so; for such would necessarily be the result of holding that the Chinese crew of a vessel coming from a foreign port to one of the United States are 'laborers,' within the meaning of the act. Such a 'limitation' upon the right of the Chinese to enter or be brought within our ports is clearly beyond the letter and spirit of the concession made by the supplemental treaty, which declares that it shall only apply 'to Chinese who may go to the United States as *laborers*;' that is, with the intention to labor here and enter into competition with the labor of the country. Upon this ground, also, it is clear to my mind that the act does not apply to the crew of the *Patrician*. Of course, a Chinese seaman, although allowed to come into the ports of the United States as one of the crew of a vessel from a foreign port, does not thereby obtain the right to remain in the country and become a laborer therein; and if the master allows him to go ashore permanently, the latter would be liable to removal, and the former to the punishment prescribed in section 2 of the act. But such seamen would have the same right to be on shore temporarily and not otherwise employed than in the business of the vessel during her stay in port, as those of other nationalities."

In the case of *In re Jam* (101 Fed. Rep., 989) the district court for the southern district of New York held that a Chinese seaman "is not within the purview of the acts so long as he merely touches here for no other purpose than to reship so soon as shipment can be obtained," and that the views announced on that subject by that court in *In re Ah Kee* (22 Fed. Rep., 519) still applied.

The fact that the crew of the disabled *City of Peking* were brought from Kobe, Japan, to San Francisco on the *Gaelic* did not divest them of their character as the crew of the *City of Peking*. They went upon the *Gaelic*, not voluntarily as passengers, but under their agreement as the crew of the *City of Peking*, and they were bound, under the articles which they had signed, to return to Hongkong upon her or some other vessel belonging to the Pacific Mail Steamship Company. In the case of *Schermacher v. Yates* (57 Fed. Rep., 668) a crew discharged without their consent before reaching a final port of discharge were held to be entitled to recover for transportation to that place. In the present case the crew have not been discharged, but are held under their agreement for the return voyage to Hongkong.

The bare landing of the crew of the *City of Peking* (if it is to be considered a landing at all), in order that they may reship upon the *Korea*, would not, in my opinion, violate the treaty and laws in relation to the exclusion of Chinese. I see no objection, therefore, to permitting them to come ashore for that purpose under proper custody and safeguards; and, as a matter of just and reasonable convenience under the peculiar circumstances of the present case, the crew may be transferred direct to the *Korea* for the purpose of reshipment for the return voyage.

The papers transmitted with your letter are herewith returned.

Respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

---

#### GIFTS FROM FOREIGN PRINCE—OFFICER—CONSTITUTIONAL PROHIBITION.

The provision of Article 1, section 9, clause 9 of the Constitution, which forbids the acceptance, without the consent of Congress, by any person holding any office of profit or trust under the United States, of any "present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state," applies as well to a titular prince as to a reigning one; and a simple remembrance of courtesy, even if merely a photograph, falls under the inclusion of "any present of any kind whatever."

This prohibition expressly relates to official *persons*, and does not extend, under the circumstances outlined, to a department of the Government or to governmental institutions.

DEPARTMENT OF JUSTICE,

*September 8, 1902.*

SIR: I have the honor to respond to your note of August 27, submitting for my consideration a copy of a note from the German embassy, which communicates a list of presents bestowed by Prince Henry of Prussia on the occasion of his recent visit to this country. You ask my opinion on the question whether the constitutional provision which forbids the acceptance, without the consent of Congress, of any "present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state," may be construed as applying only to a reigning prince, in which case the authority of Congress for the delivery of these presents would not be required. The presents consist of portraits given to the Navy Department, the Military Academy and the Naval Academy, and of a photograph to each of several military and civil officers of the United States. The provision of the Constitution is as follows:

"No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." (Art. I, sec. 9, cl. 9.)

It is evident from the brief comments on this provision, and the established practice in our diplomatic intercourse (2 Story on the Constitution, 4th ed., pp. 216, 217; 1 Wharton's Int. Law Dig., sec. 110, p. 757), that its language has been viewed as particularly directed against every kind of influence by foreign *governments* upon officers of the United States, based on our historic policies as a nation. Although it is manifest that the particular collocation of words in the Constitution, like the words "any foreign prince or state" in the neutrality statutes, refers chiefly to a foreign government and its regular executive (cf. act January 31, 1881; 21 Stat., 604), it would not, in my judgment, be sound to hold that a titular prince, even if not a reigning potentate, is not included in the constitutional



prohibition. For the phrase of the provision is “*any king, prince, or foreign state,*” and a titular prince, although not reigning, might have the function of bestowing an office or title of nobility or decoration, which would clearly fall under the prohibition. As this remark suggests generally the character of the gift, whether a present or some title of honor (although you do not suggest this point), it must be observed that even a simple remembrance of courtesy, which from motives of delicacy recognizes our policy, like the photographs in this case, falls under the inclusion of “*any present \* \* \* of any kind whatever.*” The act of 1881 (*supra*) which, it is true, refers only to a foreign government, uses the words “*any present, decoration, or other thing.*”

But as the constitutional prohibition expressly and exclusively relates to official *persons*, it could not properly be extended, under the circumstances at all events, in my judgment, to a department of the Government and to governmental institutions.

I have the honor to answer your question in the negative.

Very respectfully,

HENRY M. HOYT,

*Acting Attorney-General.*

The SECRETARY OF STATE.

---

ATTORNEY-GENERAL—OPINION.

The Attorney-General declines to express an opinion upon the question whether the Postmaster-General should enter into a contract with the Return Postage Clearing Company for the institution of the “Reply envelope and postal card” scheme, for the reason that the question is hypothetical in its nature and involves considerations of administrative discretion and judgment, and of practicability and advisability, which must be determined solely by the Postmaster-General.

DEPARTMENT OF JUSTICE,

*September 10, 1902.*

SIR: Referring to the request of your predecessor for an opinion, dated July 7, 1899, relative to the proposal of the Return Postage Clearing Company, consideration of which has been suspended in the interim, owing, as I understand,

to the desirability of further investigation by your Department; and referring to recent correspondence on this subject, I have the honor to say that the form of the request for an opinion presents a question merely hypothetical. In effect, there was referred to me an inquiry which involves considerations of administrative discretion and judgment, of practicability and advisability, as well as the simple question of law founded thereon. It does not appear that the former Postmaster-General had conclusively settled in favor of the said proposal all of these extra legal considerations which must be solely determined by the Postmaster-General in his discretion. If the form of the question had been substantially that the acceptance of the proposal having been determined to be proper and advisable from the administrative point of view, and the Postmaster-General, being ready accordingly to enter into a contract, desired to know whether that step was justified by existing provisions of law, I should have responded, or should now respond, to the query presented.

I am confirmed in the view that it is not proper for me, on the ground of the hypothetical nature of the question at this stage, to render an opinion (13 Opin., 531; 20 Opin., 440; 21 Opin., 506, 509; 22 Opin., 77), because I am informed this day by the Acting Postmaster-General that the subject is at present under investigation by you, and that you have before you now, for your consideration and action, a report of a commission to consider the advisability of adopting the "reply envelope and postal card" scheme, this commission having been appointed by you under directions to make "a thorough examination of the merits of the several devices which have been presented." For these reasons and under these circumstances I must respectfully decline to reply to the request of your predecessor. I return the inclosures herewith.

Very respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

THE POSTMASTER-GENERAL.

## INTERNAL-REVENUE TAX—CIGARS—PHILIPPINE ISLANDS.

Cigars shipped from the Philippine Islands to the United States are not subject to internal-revenue tax under section 3402, Revised Statutes. Prior to the passage of the act of July 1, 1902 (32 Stat., 691), the Philippine Islands were "within the exterior boundaries of the United States" within the meaning of section 3448, Revised Statutes, and subject to its provisions; but since its passage the provisions of that section have been inoperative in those islands, section 1 of that act providing in effect that the laws of the United States shall not apply to the Philippine Islands. No internal-revenue tax therefore can be imposed under the laws of the United States on cigars shipped into this country from the Philippine Islands.

## DEPARTMENT OF JUSTICE,

*September 11, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter transmitting a letter from the Commissioner of Internal Revenue and requesting my opinion as to whether cigars shipped from the Philippine Islands "are subject to internal-revenue tax as well as duty under the laws of the United States."

Section 3402, Revised Statutes, provides that "All cigars imported from foreign countries shall pay, in addition to the import duties imposed thereon, the tax prescribed by law for cigars manufactured in the United States." In the *Fourteen Diamond Rings case* (183 U. S., 176) the Supreme Court held that goods brought from the Philippine Islands were not "imported from a foreign country" within the meaning of our revenue laws. In view of this decision, cigars shipped from the Philippine Islands to the United States are not subject to internal-revenue tax under said section 3402, Revised Statutes.

Section 3394, Revised Statutes, imposes internal-revenue tax "upon cigars which shall be manufactured and sold, or removed for consumption or use," said tax to be paid by the manufacturer of the cigars.

Section 3448, Revised Statutes, reads as follows:

"The internal-revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars shall be held to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same be within a collection district or not."

In "*The Cherokee Tobacco*" case (11 Wall., 616) it was held that section 3448 is in force in the Indian Territory, and supersedes a prior treaty with the Cherokee Nation of Indians. The court said (page 620):

"The language of the section is as clear and explicit as could be employed. It embraces indisputably the Indian territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exemption had been intended, it would doubtless have been expressed."

Mr. Justice Bradley (with whom concurred Mr. Justice Davis), after expressing his reasons for dissenting from the opinion of the court, said (page 624):

"This view is strengthened by the fact that there is territory within the exterior bounds of the United States to which the language of the 107th section of the recent act can apply, without applying it to the Indian Territory, to wit, the territory of Alaska."

It is clear that Alaska was then understood by the court to be within the exterior boundaries of the United States, and therefore within the provisions of said section.

No reason can be found why the Philippines, prior to the passage of the act of July 1, 1902, "Temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," were not also within the provisions of said section. They were "within the exterior boundaries of the United States," and were not, prior to July 1, excluded from the provisions of said section.

But the first section of said Philippine act of July 1, 1902, provides in effect that the laws of the United States shall *not* apply to the Philippine Islands.

I am therefore of the opinion that since said act went into effect, the provisions of said section 3448 have been inoperative in the Philippines. The provisions of section 3394 undoubtedly apply only to cigars manufactured within the bounds of our internal revenue laws, i. e., within the territory where these laws are operative. If this view is not correct, there was apparently no necessity for the passage

of section 3402, which says that "all cigars imported from foreign countries shall pay an internal revenue tax."

In the Porto Rican or Foraker Act of April 12, 1900, Porto Rico was excepted from the operation of our internal revenue laws, but under section 3 of said act a tax was imposed upon "articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale," "equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture." No such provision was made in the Philippine act with reference to the collection of an internal revenue tax on articles coming into the United States from the Philippines.

I am therefore of the opinion that no internal revenue tax can be legally imposed under the laws of the United States on cigars shipped from the Philippine Islands.

Respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

The SECRETARY OF THE TREASURY.

#### TONNAGE TAX—PORTO RICO—MARINE-HOSPITAL SERVICE.

The tonnage tax collected in Porto Rico under section 14 of the act of June 26, 1884 (23 Stat., 57), as amended by section 11 of the act of June 19, 1886 (24 Stat., 81), should be so deposited as to be available for the maintenance in part of the Marine-Hospital Service.

DEPARTMENT OF JUSTICE,  
*September 17, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of the 14th ultimo inclosing a letter "from the collector of customs at San Juan, P. R., in which he requests a decision whether tonnage tax collected in Porto Rico shall be so deposited as to be available for the maintenance in part of the Marine-Hospital Service."

Under section 4585, Revised Statutes, there was formerly assessed and collected by the collectors of customs "from the master or owner of every vessel of the United States arriving from a foreign port, or of every registered vessel

employed in the coasting trade, \* \* \* the sum of 40 cents per month for each and every seaman" who had been employed on such vessel since she was last entered at any port of the United States; and such master or owner was authorized to retain such sum from the wages of such seaman. Section 4803, Revised Statutes, provided that all such moneys should be "placed to the credit of 'the fund for the relief of sick and disabled seamen,' of which fund separate accounts should [shall] be kept in the Treasury." Section 15 of "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes," approved June 26, 1884, repealed said section 4585, Revised Statutes, and provided that the expense of maintaining said Marine Hospital Service should thereafter be borne by the United States out of receipts for duties on tonnage provided for in that act. Such tonnage duties are levied in Porto Rico under section 14 of said act of June 26, 1884, as amended by section 11 of the act of June 19, 1886.

It will readily be perceived that the tonnage taxes collected under the provisions of said act of June 26, 1884, as amended, constitute a special and separate fund for a distinct and specific purpose, viz, for the maintenance of the Marine-Hospital Service. The reasons assigned for my opinion of July 15, last, wherein it was held that certain head money levied on immigrants should be accounted for and included in the "immigrant fund," as is done in the case of alien passengers "arriving at ports of the United States," are applicable to the case under consideration.

Section 4 of the Porto Rican act of April 12, 1900, provided that all collections of duties and taxes in Porto Rico under the provisions of the act should be paid into the treasury of Porto Rico "to be expended as required by law for the government and benefit of Porto Rico." It was held in said opinion of July 15, last, that the duties and taxes referred to in said section 4 are those levied and collected as such and which, without special legislation, would be covered into the general fund of the treasury, and be devoted to the general purposes of government.

If we permit the tonnage dues collected in Porto Rico to be covered into the Porto Rican treasury, the money thus collected will be devoted to a purpose entirely foreign to that contemplated in the law providing for the support of the Marine-Hospital Service.

It is reasonable to believe that Congress, in extending the laws of the United States not locally inapplicable to Porto Rico (sec. 14, Porto Rican act), and in nationalizing Porto Rican vessels and admitting same to the benefits of our coasting trade, intended that Porto Rico should have the benefits of the Marine-Hospital Service. As that service is supported and maintained out of a separate fund provided for that purpose, it is believed that Congress intended that tonnage dues collected in Porto Rico should not be paid into the Porto Rican treasury, but should augment the Marine-Hospital fund. If the *benefits* of the Marine-Hospital Service were meant to be extended to Porto Rico under the provision of said section 14 of the Porto Rican act, there is no reason to believe that Congress intended to except Porto Rico from the *burden* of such service. In other words, if part of the law is applicable to the island, it is all applicable. Inasmuch as it will undoubtedly require the money thus collected in Porto Rico to maintain the Marine-Hospital Service there, the spirit of said section 4 of the Porto Rican act will be carried out, as well as the letter of the laws relating to the Marine-Hospital Service, made applicable to Porto Rico by section 14 of said Porto Rican act.

I am, therefore, of the opinion that the tonnage tax collected in Porto Rico should "be so deposited as to be available for the maintenance in part of the Marine-Hospital Service."

Respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

The SECRETARY OF THE TREASURY.

BRANDING OR LABELING FOOD AND DAIRY PRODUCTS.

The act of July 1, 1902 (32 Stat., 632), which prohibits the false labeling or branding of dairy and food products which enter into interstate commerce, does not provide that such products shall be labeled or branded so as to show the State or Territory in which they are produced. It provides merely that such products shall not be falsely labeled or branded as to the State or Territory in which they are made, produced, or grown. The mere omission, in the instances given, of the place of manufacture can not be said to be in violation of that law; nor is the name of the wholesale dealer on the label or brand necessarily a representation that he is the manufacturer or producer.

DEPARTMENT OF JUSTICE,

*September 20, 1902.*

SIR: Your letter of the 13th instant contains the following statement:

"It is common practice for canned goods and other articles of food to be labeled with the name of the wholesale grocer, often without the name of the manufacturer. In some cases such goods are manufactured in one State and bear only the name of the wholesale grocer whose place of business is in another State. A typical label of this nature is the following: 'Packed for W. L. Taylor Co., Ltd., wholesale grocers, Shreveport, La.' Another class of labels omits the words 'packed for,' and also 'wholesale grocers.' For instance, 'The T. C. Brand Lima Beans, W. F. Taylor Co., Ltd., Shreveport, La.'"

You ask to be informed whether, in my opinion, "these labels would be held to violate public law No. 223, enacted by the last Congress and approved July 1, 1902?"

The first section of the act mentioned provides:

"That no person or persons, company or corporation, shall introduce into any State or Territory of the United States or the District of Columbia, from any other State or Territory of the United States or the District of Columbia, or sell in the District of Columbia or in any Territory any dairy or food products which shall be falsely labeled or branded as to the State or Territory in which they are made, produced, or grown, or cause or procure the same to be done by others."

This measure originated in the House, where it was introduced last January in substantially the form it now bears.



The Committee on Interstate and Foreign Commerce, to whom it was referred, reported in part as follows:

"During the Fifty-sixth Congress this committee gave hearings upon and devoted some time and attention to parties appearing in favor of a bill identical with this, and the necessity for such legislation was explained at length.

"It seems that at present there are no interstate commerce laws which adequately protect any State or Territory from the efforts of designing and unscrupulous dealers from outside the particular State or Territory to impose upon the public food or dairy products, branded or labeled as the product of a State or Territory famous for the production of a certain commodity or luxury, which, in fact, is an inferior article, and which, were it not for such brand or label, could be placed upon the market only at a lesser price, and sometimes not at all, were its true character known.

"This fact is particularly true of two articles—cheese and maple sirup. In almost every store in any of the large cities may be found packages labeled 'Vermont maple sirup,' which was never produced in Vermont, and some of which is entirely artificial, yet which is sold at the highest price because of the label which it carries. In the matter of cheese and butter this practice is carried still further because of the greater demand.

\* \* \* \* \*

"It is believed the enactment of the bill into a law would correct the evils which it is intended to correct, and the committee recommend that it do pass as amended."

The Senate committee to which the bill was referred, in submitting its report, after stating that the bill was "directed only against interstate commerce in articles of food and dairy products misbranded as to the State or Territory in which such articles are manufactured or produced," adopted the report of the House committee.

It will be noticed that this law does not provide that food and dairy products entering into interstate commerce *shall* be labeled or branded so as to show the State or Territory in which they are produced. It simply provides \* \* \* that such products shall not be "falsely labeled or branded as to the State or Territory in which they are made, produced, or grown." In the examples given by you the mere

omission of the place of manufacture can not be said to be a violation of the law. The name of the wholesale dealer on the label or brand is not necessarily a representation **that he** is the producer or manufacturer of the goods. Of course, if goods are manufactured or produced in one State, and the wholesale dealer is a resident of another, and the label or brand is so worded as to represent the dealer as the producer, there would be a violation of the law if such commodities were introduced into one State from another. But, in my opinion, none of the labels given by you comes within this class.

Respectfully,

JOHN K. RICHARDS,  
*Acting Attorney-General.*

The SECRETARY OF AGRICULTURE.

---

CERTIFICATE OF MERIT—ENLISTED MAN—MILITARY  
SERVICE.

The President may grant a certificate of merit to an enlisted man of the Army who has distinguished himself in the service and is recommended for such certificate by the commanding officer of his regiment or by the chief of the corps to which he belongs, notwithstanding the fact that he is not in the military service at the time his case reaches the President for consideration, and, if granted the certificate, will be entitled to additional pay for the period intervening between the date of such service and the date of his discharge from the military service; but the President can not grant a certificate of merit if the recommendation therefor by the commanding officer or chief of his corps was made after the enlisted man was discharged from the military service.

DEPARTMENT OF JUSTICE,

*September 23, 1902.*

SIR: Your letter of July 5, 1902, and subsequent communications submit for my opinion the two following questions:

“1. When an enlisted man of the Army has distinguished himself in the service, and is recommended for a certificate of merit by the commanding officer of his regiment, or by the chief of the corps to which such enlisted man belongs (sec. 1216, Rev. Stat.), can the President grant him a certifi-

cate of merit, notwithstanding the fact that the man is not in the military service at the time the case reaches the President for consideration, when it appears that the man, if granted a certificate of merit, will be entitled to additional pay for the period intervening between the date of such distinguished service and the date of his discharge from the military service?

“2. Under like circumstances, can the President grant a certificate of merit, if the recommendation therefor, by the commanding officer of his regiment or chief of his corps, was made after the enlisted man was discharged from the military service?”

It is obvious that cases of this nature actually and constantly arise.

By your request for an opinion and the related memorandum subsequently transmitted, I was referred to the opinion of Mr. Devens (16 Opin., 9), to opinions of Judge-Advocates-General, to the War Department practice, and to paragraph 199 of the Army Regulations of 1891. The legislation important to be considered is as follows:

Section 17, act of March 3, 1847 (9 Stat., 186), from which section 1216, Revised Statutes, is taken, provides that when a non-commissioned officer shall distinguish himself, or may have distinguished himself, in the service, the President may, on the recommendation of the commanding officer of the regiment to which such non-commissioned officer belongs, attach him by brevet of the lowest grade of rank, etc., to any corps of the Army; and then provides: “And when any private soldier shall so distinguish himself the President may, in like manner, grant him a certificate of merit, which shall entitle him to additional pay at the rate of two dollars per month.”

Section 1216 of the Revised Statutes, as amended by the acts of February 9, 1891 (26 Stat., 737), and March 29, 1892 (27 Stat., 12), provides:

“That when any enlisted man of the Army shall have distinguished himself in the service the President may, at the recommendation of the commanding officer of the regiment or the chief of the corps to which such enlisted man belongs, grant him a certificate of merit.”

Section 1285, Revised Statutes, as amended by the act of February 9, 1891 (*ut supra*), provides that—

“A certificate of merit granted to an enlisted man for distinguished service shall entitle him, from the date of such service, to additional pay at the rate of two dollars per month while he is in the military service, although such service may not be continuous.”

It does not seem to me that these slight changes recently carried into the law have made any material difference in the nature of the question.

The opinion of Attorney-General Devens holds that a certificate of merit can not be issued under section 1216, Rev. Stat. (before amendment), to a soldier who applies for the same after his discharge. Mr. Devens makes no special distinction between the *grant* and the actual *issuance* of a certificate, and his view manifestly relates to a case where the claim was in all respects initiated after discharge.

I note here that in 5 Opin., 22, considering the first portion of section 17 of the original act of 1847 (*supra*), Mr. Toucey held that non-commissioned officers may receive brevet commissions, although not in fact non-commissioned officers at the time such reward for distinguished service was conferred. This conclusion evidently regards prompt application and unavoidable delay merely in the actual grant or issue, and regards, further, on the one hand, a termination of the particular non-commissioned status but continuance in the service in other capacities; and, on the other hand, as to two officers involved, an actual expiration of the term of service or discharge. So far, then, the earlier opinion is contrary to Mr. Devens's view. Mr. Toucey states fully the grounds upon which the liberal construction of such statutes is based, in the policy of Congress to promote the public service by these incentives to acts of bravery; and also rests his conclusion, as to the officers discharged, on the special ground of the President's power to appoint even private citizens to be officers in the military service—a consideration which is not applicable to certificates of merit.

The opinions of Judge-Advocates-General have uniformly construed the law in accordance with the opinion of Attorney-

General Devens. (Digest, Opinions J. A. G., ed. 1901, secs. 667, 668; opinion of May 8, 1902.)

The Army Regulations (ed. 1901, paragraphs 196–199), while imposing a condition (paragraph 197) which the law does not demand (sec. 668, Dig. Opin. J. A. G.), may be said to carry out that opinion, for the issue or delivery of a certificate after the soldier's discharge, contemplated in paragraph 199, is consistent with an application or recommendation and grant before discharge. At all events, it appears that, with certain recent exceptions, the continuous practice of the War Department has been not to grant certificates of merit after a private soldier or enlisted man has left the service.

The situation, then, is such that the legal view of this Department and the view and substantially uniform practice of the War Department, covering together a long period of time, have followed the same construction of laws which are practically the same in their present as in their past form; and the question now arises whether this construction is so clearly erroneous as to require or justify reversal. Indeed, it may be said that this Department has never expressed a plainly contrary view, for the opinion of Mr. Toucey might justly be distinguished as relating in part to a case where a brevet officer had remained in the service, although in a different capacity from that designated by the statute, and in part to cases, where from the nature of the subject—brevet commissions as differentiated from certificates of merit—the broad ground of an unqualified right in the Executive to appoint to military office could be invoked on behalf of those former non-commissioned officers who had become separated from the service. Undoubtedly the policy of Congress in these statutes is intended to be liberal; but undoubtedly also that policy and many just considerations of general governmental policy contemplate a prompt assertion of such a claim and deprecate or forbid delay and such neglect as may render substantiation difficult and doubt of the title natural simply because of the passage of time.

In the associated subject of medals of honor under the act of March 3, 1863 (sec. 6; 12 Stat., 744, 751), regarding which arguments requiring officers and men to be still in the

service might be advanced similar to and perhaps as strong as those suggested regarding the certificate of merit laws. It seems, nevertheless, that it is the practice of the War Department to present medals of honor to persons formerly in the military service as officers or enlisted men, but not in that service at the time of the presentation. Without intending to advert to this fact as an inconsistency, or as not congruous with an opinion of the Judge-Advocate-General (Sept. 2, 1891), that the medal of honor law of 1863 is no longer in force, I may point out as bearing on the elements of proper policy as to *any* such military honor that Attorney-General Miller (20 Opin., 421) holds that a claim for a medal of honor should not be entertained after an unexplained delay of twenty-eight years in bringing forward the claim; that such *laches* sufficiently discredits an application for a medal of honor, this view being "in obedience to a principle of general jurisprudence, based on the teaching of experience, that 'the lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and the other means of judicial proof.'"

Considering for a moment the elements that are more strictly legal, it may be said, for instance, that the very term "private soldier," or, as it is now, "enlisted man," reasonably imports that character, not necessarily at the time a certificate of honor is delivered, but certainly at the time the application or recommendation is made; that the use of the word "belongs," being *in præsenti*, plainly requires this result. On the other hand, a reply to that position would be that a strict insistence on the force of the present tense would bring us to the *reductio ad absurdum* that the beneficiary must be in the service at the date when the law was passed. But I do not deem it necessary to analyze and attempt to reconcile these phases of the case nor to adduce authorities, for on the whole my view is clear that prior construction has not been manifestly wrong; that so far as there may be valid doubt or a balance of doubts regarding this construction, the principle of adhering to an interpretation long followed should be applied to this case. This principle in executive opinions regards with especial respect the guide of long-continued departmental practice (2 Opin., 558; 4 Opin., 470; 10 Opin., 52; 22 Opin., 163), a guide

132 *Certificate of Residence—Chinese—Return Certificate.*

which is also recognized in judicial opinions. (*Edwards's Lessee v. Darby*, 12 Wheat., 206; *United States v. Hill*, 120 U. S., 169; *Robertson v. Downing*, 127 U. S., 607.) A view of the principle which is especially controlling upon the Attorney-General is that "a question once definitely answered by one of my predecessors and left at rest for a long term of years should be reconsidered by me only in a very exceptional case." (21 Opin., 24.)

These considerations, nevertheless, in the light of distinctions indicated above, reasonably permit an affirmative answer to your first question, but require a negative answer to your second question, it being understood that the recommendation referred to coming after the man's discharge is tantamount in effect to an application which initiates the claim. I therefore have the honor to answer your questions accordingly.

Very respectfully,

P. C. KNOX.

The SECRETARY OF WAR.

---

CERTIFICATE OF RESIDENCE—CHINESE—RETURN  
CERTIFICATE.

A Chinese person possessing a "certificate of residence" as a person other than a laborer, issued to him under the provisions of the act of May 5, 1892 (27 Stat., 25), is not entitled thereby to the "return certificate" provided for in Article II of the treaty with China of December 8, 1894 (28 Stat., 1210), as that article applies only to registered Chinese laborers.

DEPARTMENT OF JUSTICE,

October 17, 1902.

SIR: By your letter of October 13 you submit for my opinion the question whether a Chinese person who is possessed of a "certificate of residence" as a person other than a laborer, issued to him under the provisions of the act of May 5, 1892, is entitled to a "return certificate."

The act of 1892 provided (sec. 6) for the registration of resident Chinese laborers, and the issue to them of certificates of residence, and also provided that "any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge." Under this latter provision the applicant

in this case was furnished with a certificate of residence as a person "other than a laborer."

The provision of the law for "return certificates" is found in Article II of the treaty of 1894, which manifestly is applicable only to registered Chinese laborers. Sections 5-7 of the act of September 13, 1888, the full validity of which is in doubt, also make it clear that Chinese laborers alone are contemplated in the explicit return concessions of the law.

It has been decided that a domiciled Chinese merchant may reenter this country after temporary absence without the certificate required by section 6 of the act of 1884 (*Lau Ow Bew v. United States*, 144 U. S., 47), and this decision would extend to a member of any of the permitted classes specifically enumerated in the law (e. g., Art. III, treaty of 1894) who had acquired a domicile in this country. The view of this Department has been that a Chinaman "not a laborer" is not for that reason a member of the expressly permitted classes. Whether the status of the applicant here continues to be that of a non-laborer, or whether as such he is also a member of one of the permitted classes, and, being domiciled here, is entitled to reenter this country after a temporary absence without a certificate, but under proof of his former status here as required by section 2 of the act of November 3, 1893, is a question of fact committed to your determination and not mine.

I have the honor to answer the question which you submit in the negative, and to return the papers herewith.

Very respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

---

CIVIL-SERVICE LAW—POLITICAL CONTRIBUTIONS—SOLICITATION OF BY FEDERAL OFFICER.

The sending of a circular letter by a political committee to Federal officers and employees, soliciting financial aid in Congressional or State elections, upon or attached to which appear the names of Federal officers or employees, is a violation of section 11 of the Civil-Service act (act of January 16, 1883; 22 Stat., 406) which declares that no officer or employee of the Government shall be in any manner concerned in soliciting or receiving any assessment or contribution for any political purpose whatever from any officer or employee of the United States.



The statute unquestionably condemns all such circulars notwithstanding the particular form of words adopted in order to show a request rather than a demand and to give the responses a quasi-voluntary character.

DEPARTMENT OF JUSTICE,  
*October 17, 1902.*

SIR: Your note of the 15th instant requests me to advise you relative to the subject of political contributions as shown by the respective correspondence which you inclose between the Civil Service Commission and officers of the Republican State committees of Pennsylvania and Ohio.

In the Pennsylvania case it appears that recently a circular letter was issued by the Republican State committee, signed "M. S. Quay, chairman," stating that financial assistance is needed in the coming Congressional and State election and that the committee will be greatly obliged if the addressee will aid to the extent of his ability and inclination. This circular letter bore in its caption as well the name of Senator Quay as chairman and of W. R. Andrews (clerk to the Senate Committee on Immigration) as secretary, and was sent by mail to various Federal officers and employees at their home addresses. Upon advice from the Commission that because of their official relations neither Senator Quay nor Mr. Andrews could properly serve upon a committee concerned in soliciting and receiving political contributions from Federal officials, or permit their names to be held forth in letters making such solicitation, the circular letter, so far as addressed to Federal officials, was withdrawn. Immediately thereafter another circular letter was issued in identically the same form, except that it bore the signature of the treasurer of the committee, who is not a Federal officeholder. The Commission pointed out the illegality of this circular because it carried on its heading the names of Senator Quay and Mr. Andrews, and directed its recall; and this ruling is now contested by Senator Quay as chairman of the committee.

In the Ohio case a circular was issued by the Republican State executive committee, bearing the names of Hon. Charles Dick (member of Congress) and of various Federal officials, and stating that any assistance which the addressee "can give as one of those directly interested in party success in Ohio will be gratefully acknowledged." It seems

that this circular was sent to certain Federal officials, that the Commission demanded its withdrawal, and that the executive committee declines or neglects to accede to this demand.

The question presented is covered by section 11 of the Civil-Service act, which provides:

“That no Senator, or Representative, or Territorial Delegate of the Congress, or Senator, Representative, or Delegate elect, or any officer or employee of either of said Houses, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch, or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States.”

Whatever the particular form of words adopted in such circulars in order to show a request rather than a demand and to give to responses a quasi-voluntary character, the explicit and comprehensive words of the statute, forbidding those barred by their public relations to solicit from Federal officials, directly or indirectly, or to “be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever,” unquestionably condemn all such circulars. They should not be sent to Federal officials, or else they should not bear the names of the public officers and employees designated in the act. In 21 Opin., 300, Attorney-General Harmon said:

“All who are in the Government service are thus protected against the possibility of actual coercion and from that of the coercion implied in the relation of the person soliciting or receiving to the Government or implied in solicitation or receipt in a public office; but Congress did not attempt to prohibit solicitation by or payment to persons not in the Government service otherwise than in Government offices.”

It is also pertinent to notice section 14 of the act, viz: "That no officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of the House of Representatives, or Territorial Delegate, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever."

Your power to direct, by appropriate order, under the mandates of these sections, all persons in the executive service of the United States is clear.

I do not understand that I am now called upon by your present reference to consider the penal section of the act (sec. 15), which relates back to all the persons designated, and all the acts forbidden by sections 11 and 14, *inter alia*.

Very respectfully.

P. C. KNOX.

The PRESIDENT.

---

#### LICENSED OFFICERS OF STEAM VESSELS—COMPULSORY TESTIMONY.

A licensed officer of a steam vessel, duly summoned to give testimony in a hearing before a board of United States local inspectors of steam vessels, who refuses to answer questions which are, in the opinion of the board, material and proper, may be compelled to answer, under the penalty of suspension or revocation of his license, or otherwise.

A refusal on the part of a witness to answer a proper question pertinent to the issue before a court is a contempt, and while this power may not be absolute in this special tribunal, which is not given the right to impose fines or imprisonment for disobedience to its authority, nevertheless the principle may be invoked so far as the special service and special discipline go.

Such licensed officer when charged with a violation of section 4449, Revised Statutes, and on trial before the above-named board on such charge, has no right to refuse to answer a question material to the inquiry upon the ground that his answer may subject him to the penalty provided in that section.

Section 4449, Revised Statutes, is a remedial, not a penal, statute, and the revocation of a license as therein provided may be viewed rather as a remedy to insure better efficiency in the Steamboat-Inspection Service than as a punishment for an offense committed.

Such licensed officers are engaged in a special service, peculiarly related to the Government; they are endowed with certain privileges and subject to certain burdens, and paramount considerations of the good of the service require that such an officer shall not be permitted to withhold any information material to an inquiry affecting the service and yet remain a member of that service.

DEPARTMENT OF JUSTICE,

*October 18, 1902.*

SIR: Your communications of August 26 and September 17 submit to me the following facts and questions of law arising thereon, with a request for my opinion:

In a certain investigation before United States local inspectors of steam vessels, respecting a number of duly licensed pilots and engineers who, it was alleged by certain vessel owners, had violated section 4449 of the Revised Statutes, several of these licensed officers refused to answer questions propounded to them, on the ground that their answers might tend to subject them to revocation of their licenses as provided by section 4449, and that to furnish the information called for by the questions would be a violation of their obligation to the protective union of tugmen to which they belong, this organization having issued a strike order which affected the service of licensed pilots and engineers on a large number of steam tugs. It seems that other licensed pilots and engineers, not under investigation but called as witnesses, refused to answer questions propounded to them on similar grounds, some witnesses simply refusing to answer.

The questions of law arising are as follows:

1. When a licensed officer is duly summoned to give testimony before this board [the local board of the inspection service] in a hearing, and refuses to answer questions which are in the opinion of the board material and proper, has the board authority to compel answer under penalty of suspension or revocation of the witness's certificate of license or otherwise?

2. Has the licensed officer who is charged with violating section 4449 of the Revised Statutes, and is on hearing before this board on such charge, the right to refuse to answer a question material to the inquiry, on the ground that his answer may subject him to the penalty of section 4449?

It appears that the Solicitor of the Treasury, on a reference of the subject by you, has rendered opinions answering the first inquiry in the negative and the second in the affirmative.

The entire plan of Government control over this branch of commerce and its instrumentalities, as shown in Title LII, Revised Statutes, is based upon public interest in "the better security of life," justifying the creation of a special Government service regarding the management, navigation, and inspection of sea-going vessels and vessels engaged in trade on the Great Lakes and other waters of the United States. The theory of the matter and the function of the Government in protecting the people in this semi-public service require, and the law accordingly imposes, burdens upon vessel owners, with corresponding rights or privileges, and qualifications or restrictions upon the specially skilled men who navigate and operate vessels. These conditions, operating to limit the number of those qualified and licensed, constitute also an advantage to the men actually in the service. Only licensed officers may be employed (sec. 4438). These correlative burdens and benefits are enforced by a system of penalties ranging from the revocation of licenses and trifling fines to fines clearly penal and imprisonment under those provisions of Title LII which are manifestly criminal. The investigations of the boards of inspection cover different aspects of the relations existing and the transactions arising in this maritime and quasi Government service, and may be conducted, as they constantly are conducted, upon the Government initiative or upon the complaint or suggestions of private parties and vessel owners. And it is apparent that vessel owners themselves, as well as members of the special licensed service, are subject in various contingencies to investigation and possible penalty, more or less serious. For the crimes and misdemeanors which these laws define—that is, for all the more serious offenses—a regular course of procedure through the criminal courts, or for the recovery of penalties or forfeitures through judicial proceedings, is provided. And within the jurisdiction of the inspection boards, either for arriving at a finding of the real facts as to many different occurrences,

in order to inform the administrative arm, or for maintaining the freedom and efficiency of the navigating side of the service by disciplinary and corrective measures, the law provides for appeal and review of the findings or action of the tribunal of first instance. (Sec. 4452; and see also sec. 5294, as to remission of penalties.)

Thus, that licensed officers constitute a special service, peculiarly related to the Government if not *of* the Government, is evident not only from irresistible conceptions drawn from the entire body of these laws, but from such provisions as the act of May 28, 1896, amending section 4131, Revised Statutes, and adding other provisions. This law brings out very clearly the interrelations of the Government, vessel owners, and the skilled men employed on board vessels, and the way in which benefits and privileges, on the one hand, and burdens and restrictions on the other, interdepend among the different interests, by the requirements that a vessel shall be wholly owned by a citizen of the United States or by a corporation created under the laws of a State, shall be commanded by a citizen of the United States, and that all watch officers, including engineers and pilots, shall be native-born or fully naturalized citizens; and by their exemption from liability to draft in time of war, and by the right to pension conferred, based upon the duties performed under the license in the military service of the United States. Consequently, in whatever way investigation of owners or employees may arise, since full opportunity for review of administrative proceedings and action is given, and the more serious charges must go to judicial trial, the suggestion is reasonable and logical that no other allegiance of owners to possible associates, or of licensed men to labor organizations, can interfere with the different measures of control over them, respectively, justly exercised by the Government.

Passing on, then, from this review of the policy and general meaning of the law, we take up the exact question presented as to the right of a licensed officer to refuse to answer questions put to him in the course of a regular investigation by a board of inspectors, on the ground that he may thereby subject himself to penalty by way of revocation or suspension of his license.

Section 4449, Revised Statutes, provides that—

“If any licensed officer shall, to the hindrance of commerce, wrongfully or unreasonably refuse to serve in his official capacity on any steamer, as authorized by the terms of his certificate of license, or shall fail to deliver to the applicant for such service at the time of such refusal, if the same shall be demanded, a statement in writing assigning good and sufficient reasons therefor, or if any pilot or engineer shall refuse to admit into the pilot house or engine room any person whom the master or owner of the vessel may desire to place there for the purpose of learning the profession, his license shall be revoked, upon the same proceedings as are provided in other cases of revocation of such licenses.”

The local boards of inspectors are directed by Congress to—

“Investigate all acts of incompetency or misconduct committed by any licensed officer while acting under the authority of his license, and shall have power to summon before them any witnesses within their respective districts, and compel their attendance by a similar process as in the United States circuit or district courts; and they may administer all necessary oaths to any witnesses thus summoned before them; and after reasonable notice in writing, given to the alleged delinquent, of the time and place of such investigation, such witnesses shall be examined, under oath, touching the performance of his duties by any such licensed officer; and if the board shall be satisfied that such licensed officer is incompetent, or has been guilty of misbehavior, negligence, or unskillfulness, or has endangered life, or willfully violated any provision of this title, they shall immediately suspend or revoke his license.” (Sec. 4450.)

Under section 4445 every licensed officer must make oath “that he will faithfully and honestly, according to his best skill and judgment, without concealment or reservation, perform all the duties required of him by law.”

These boards are thus created courts, and exercise judicial functions; they have power to summon witnesses, compel their attendance by similar process as in the United States courts, administer oaths to the witnesses summoned, and if upon examination the board are satisfied as to the incompe-

tence or guilt of the licensed officer on trial, they may pass sentence on him by revoking or suspending his license. It follows, therefore, that persons summoned to appear as witnesses before such boards are entitled to the privileges and subject to the obligations attaching to witnesses in any regular court. A refusal on the part of a witness to answer a proper question pertinent to the issue before a court is a contempt. The board of inspectors, with its power to summon witnesses, compel their attendance, etc., exercises the functions of a court, and the power to punish for contempt is inherent in all courts. "Its existence is essential to the preservation of order in judicial proceedings \* \* \* and to the due administration of justice." (*Ex parte Robinson*, 19 Wall., 505.) "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers." (*Cooper's Case*, 32 Vt., 253, 257; cited in *Ex parte Terry*, 128 U. S., 289, 303.) Now, while the power may not be absolute in this special tribunal, which is not given the right to impose fines or imprisonment for any disobedience to its authority, nevertheless the principle may be invoked so far as the special service and the special discipline go.

That a witness may refuse to answer a question where it *reasonably* appears that such answer will have a tendency to expose him to a penal liability, or to any kind of punishment, or to a criminal charge, is well settled and needs no citation of authorities. It has also been held that it is the privilege of a witness to refuse to answer questions which may have a tendency to expose him to a penalty or forfeiture. (1 Greenleaf on Evidence, sec. 453; Story Eq. Pl., sec. 607, 346; *Johnson v. Donaldson*, 18 Blatch., 287; and see cases cited in 29 Am. and Eng. Enc., p. 836.) Is the revocation of a license such a "penalty" as would entitle the witness to the benefit of this rule? While in a general sense it may be considered a penalty, it can not be so understood in a legal sense, and would not fall within the definitions of the word given by the courts. "The words 'penal' and 'penalty' have been used in various senses. Strictly and primarily they denote punishment, whether corporal or



pecuniary, imposed and enforced by the State for a crime or offense against its laws. \* \* \* But they are commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered." (*Huntington v. Attrill*, 146 U. S., 657, 667, and cases cited therein.)

The authorities holding that a witness may refuse to answer a question tending to expose him to a penalty or forfeiture appear to be mainly cases involving violations of penal statutes. Section 4449 is a remedial, not a penal, statute, and the revocation of a license therein provided for may be viewed, not in the light of a punishment for an offense committed, but rather as a remedy placed in the hands of the board of inspectors to insure greater efficiency in the Steamboat-Inspection Service, and to guard against obstructions of or injury to commerce, etc. Furthermore, even where a disability or liability is held generally equivalent to a penalty or forfeiture, a distinction is taken if the discovery subjects the defendant to a liability of this general nature *in consequence of his own agreement*, and there he is compelled to answer; and the cases mainly relate to liabilities which, though not criminal, eventually amounted to forfeiture or punishment, because they led to the actual forfeiture of estates. (*Bird v. Hardwicke*, 1 Vern., 109, and note 1.) So that the authorities fully justify us in keeping this special remedial discipline separate from the notion of criminal penalty or forfeiture.

It might, of course, happen, as suggested by the Solicitor of the Treasury in his opinion dated June 19, 1902, that on the trial of a licensed officer before the board for violation of section 4449, questions might be put which, if answered, would disclose facts showing that the officer had incurred a penal liability for which he was liable to indictment and punishment, as under section 4437. In such a case the officer would be entitled to his refusal to answer. But this has nothing to do with the present inquiry, which is confined to refusal on the ground that the officer may be subject to the penalty under section 4449—the revocation or suspension of his license.

It seems to me that a delinquent inspector (see secs. 4406, 4407) might with as much force decline to answer a question

on the ground that to do so might lead to his removal as a licensed officer decline to answer inquiries because of the danger of incurring the statutory discipline or penalty. Under the peculiar relations of this service it might reasonably be said that refusal to respond to inquiries was in itself just cause influencing the executive discretion to remove an inspector or revoke the license of an engineer, pilot, etc. Surely the power is plenary in this service to determine whether a licensed officer has wrongfully or unreasonably refused to serve; and any obstruction of investigation must necessarily call down the summary corrective power, subject to the right of review. If this is not true, the policy of this law is vain and its terms futile to carry out its theory and intent.

The refusal to answer amounts to or may conceal the bad conduct, inattention to duty, or misbehavior (if willful violation of the law is excluded from present consideration) which sections 4439-4442 and 4450 specify, *inter alia*, as grounds for suspension or revocation of license.

So broad and far-reaching is the view of "misconduct" that a ruling of the Treasury Department, dated July 27, 1893, based upon an opinion of the Solicitor of the Treasury, dated June 6, 1893, holds that a certain objectionable agreement between individual pilots and a brotherhood of pilots amounts to a hindrance of commerce, and for this reason renders licensed officers who are parties justly liable to suspension or dismissal by revocation of their license without *any* further act of "misconduct" on their part. If such is the established executive view, I think it follows as a logical necessity in administration that "misconduct" may also cover a refusal to answer pertinent questions because, among other reasons, they might point to a similar agreement. That seems to be the point as to the obligation to the protective union.

It is suggested that a licensed officer thus under investigation is liable to be deprived of his office together with salary and emoluments belonging to the same, and that for this reason he is entitled to refuse to answer a question which has a tendency to expose him to a penalty or forfeiture; but that suggestion, indeed, begs the question, and the authori-

ties cited in support of it refer to consequences which were undoubtedly penal.

In short, it is not too much to say that paramount considerations of the good of the service require that a licensed officer shall not be permitted to withhold any information material to an inquiry affecting the service and yet remain a member of that service.

The foregoing reasons of law and legal policy, therefore, in my opinion, require me to answer your first question in the affirmative and your second question in the negative, and I so answer.

Very respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

---

#### THE PANAMA CANAL TITLE.

The contract of concession of March 20, 1878, between the United States of Colombia and the International Inter-oceanic Canal Association (Exhibit C, p. 337), granted to that company the exclusive privilege of constructing a maritime canal across the territory of that Republic between the Atlantic and the Pacific oceans and of operating the same for a period of ninety-nine years from its completion; also the right to construct a railroad along and as an auxiliary to the canal. Public lands necessary for the excavation of the canal and for the construction of the railroad were granted; but all lands, together with the canal, and the railroad, if constructed, were to return to the Republic of Colombia at the expiration of the concessionary period. The contract of concession was, by its terms, transferable, but could not be ceded or mortgaged in any way to a foreign nation or Government.

This concession was transferred by the *cessionnaire* on July 5, 1879, to "The Universal Company of the Inter-oceanic Canal of Panama," hereinafter referred to as the "Old Panama Canal Company," which company began work on the canal and continued it until 1888, when, becoming involved in financial difficulties, it was, by a judgment of the civil tribunal of the Department of the Seine, on February 4, 1889 (Exhibit H, p. 375), placed in charge of a *liquidator*, who was authorized, among other things, to contribute or turn over the assets to a contemplated new company, hereinafter referred to as "The New Panama Canal Company."

On December 26, 1890, a law of Colombia (Exhibit C, p. 346) granted to the *liquidator* of the Old Panama Canal Company a prorogation or

extension of ten years in which to complete the canal. In 1892 a law of that Republic authorized the executive authority to extend the time for organizing the proposed new company and recommencing the work, which new contract should not require the approval of the Congress of that country. The executive authority thereupon extended the time for constituting the new company until October 31, 1894, and declared that the term of ten years mentioned in the prorogation of 1890 should begin on the organization of the New Company. The New Canal Company was definitely constituted October 20, 1894 (Exhibit J, p. 393), and the ten years accordingly ends October 20, 1904. On April 26, 1900, the executive power of Colombia granted or undertook to grant the New Canal Company a further extension of six years from October 31, 1904 (Exhibit C, p. 352).

Upon the formation of the New Company in 1894 the *liquidator* entered into a contract with its founders whereby all the rights, franchises, and property of the Old Company, including the stock owned by it in the Panama Railroad Company, a New York corporation, were transferred to the New Company. It was therein stipulated that the Old Company should receive 60 per cent of the net profits of the enterprise, subject to a reduction to 50 per cent in case the construction of the canal should not be attempted, or prove impossible of execution, in which event the New Company was to acquire the unconditional title to the railroad shares upon the payment of 20,000,000 francs, in the manner set out in the agreement.

On June 8, 1888, a special law of France authorized the Old Company to raise funds by means of lottery bonds (Exhibit F, p. 372), and, after its dissolution, a subsequent law authorized the *liquidator* to issue some of the same bonds. The bonds in his hands unissued were not among the rights contributed by him to the New Company.

Under the special law of France of July 1, 1893, which was passed to regulate the liquidation of the Old Company, all the acts of the *liquidator* tending to alienate the assets of the company were required to be approved by the civil tribunal of the Seine.

On January 9, 1902, the officers of the Old Company, having been duly authorized by the "general meeting" of its stockholders, offered to sell to the United States all the property and rights of the company on the Isthmus of Panama and its archives in Paris for \$40,000,000 (Exhibit T, p. 501). By formal proceedings in the civil tribunal of the Seine the *liquidator* and the *mandataire* of the bondholders of the Old Company (whose appointment had been provided for in the special law of July 1, 1893) announced their consent to such sale; and by the judgment of March 19, 1902, that tribunal approved such consent of the *liquidator* (Exhibit 4, p. 231). A division of the \$40,000,000 between the New Company and the *liquidator* of the Old Company was settled by arbitration, the submission of the matter to arbitration being authorized by a judgment of the civil tribunal of the Seine on August 2, 1901 (Exhibit O, p. 463).

One of the bondholders of the Old Company, M. Donnadiou, requested the civil tribunal of the Seine to annul its own judgment approving the action of the *liquidator*, but that tribunal, by judgment of July 3, 1902 (Exhibit 5, p. 234), decided that Donnadiou had no right of action, because, under the special law of 1893, he was represented by the *mandataire*, and that he had no right to question the power of the New Company to sell, having no legal relations with that company. That judgment was confirmed by the court of appeals of Paris on August 5, 1902 (Exhibit 6, p. 251), for the same reason; and that judgment has now become final, the time allowed for an appeal to the court of cassation having expired.

*Held*, That the United States would receive a good, valid, and unencumbered title to the property and rights in and to the Panama Canal, provided the Colombian Government consents to such transfer. The essential nature of each of the two companies, the New Panama Canal Company and the Old Panama Canal Company, is that of a voluntary partnership, their powers being similar to those of an individual Frenchman—an individual merchant corresponding to the New Company and an individual who is not a merchant to the Old Company. *These companies have, therefore, the same power to sell their property that an individual Frenchman would have*, subject to the right of third parties to oppose the sale because of claims against the property for debts, etc.

The law of July 24, 1867, and the amendment of August 1, 1893 (Exhibit 3, p. 221), which impose a few restrictive rules for the greater security of the partners and of third parties, do not change the essential character of these companies as partnerships, do not establish any tie to the Government, and do not forbid the exercise of the right to dispose of their property; nor is there any special law of France which deprives either company of this right.

History and nature of these companies and of the authority of the “general meeting” considered at length, pages 155–163.

The “*general meeting*” of stockholders of the New Company has the power, under articles 60 and 63 of the by-laws (Exhibit I, pp. 389, 390) *to offer for sale and to ratify the sale of the property in question*.

The provisions of the so-called lottery bond law, which required that all machinery for the purpose of accomplishing the work should be made in France and that the raw materials should be of French origin, will not be binding on the United States.

*The liquidator has power*, under the general law of France and the special act of July 1, 1893, and under the judgments of the civil tribunal of the Seine of March 19, 1902, and of the court of appeals of Paris of August 5, 1902, *to consent to the sale*. The tribunal which originally authorized the sale of all the property or assets of the company has the same power of authorization now.

The powers of the *liquidator* considered at length, pages 164–170.

The disposition of the right to the 60 per cent of the net earnings of the New Panama Canal Company for a cash consideration is also clearly

within the powers of the *liquidator*. It is an asset of a very ordinary kind and is no more inalienable than the canal itself.

If the title to the railroad company stock is in any sense still in the Old Company, it can clearly be sold by the *liquidator* as an ordinary asset or quit-claimed by him to a purchaser from the New Company.

*The stockholders and creditors of the New Company can not successfully question the power of the company, with the consent of the liquidator and the mandataire of the bondholders of the Old Company, to sell the canal property.* A creditor of the New Company, a solvent concern, able and willing to pay its debts, can no more prevent a sale of the company's property than the creditor of an individual can prevent him, if he is solvent, from selling his personal property or realty.

*The civil tribunal of the Seine had the power under the special law of July 1, 1893, to authorize the liquidator to ratify the sale of the canal property to the United States, and there appears to be no method known to French law whereby the validity of this law can be attacked.* In France the judicial power is distinct from the legislative, and the courts of that country have no authority to declare that a law regularly passed and proclaimed is ineffective.

The French courts have not undertaken to authorize the action of the New Panama Canal Company, which company needed no such authorization.

*In purchasing this property the United States would incur no obligations to the stockholders, bondholders, or other creditors of either company.* The stockholders would be bound by their own representative, the "general meeting." There are no bondholders of the New Company, but the bondholders of the Panama Railroad Company will have to be considered and perhaps paid from the railroad earnings or otherwise. As for its general creditors, the indebtedness to them is said to be and must be small, and can be ascertained and paid by the company before the sale is consummated or an arrangement made to apply to it a part of the purchase money.

There are no mortgages against the property, and no liens except upon two buildings upon the Isthmus. The judgments are small, amounting to about \$100,000 and interest. These subjects discussed at length, pages 180-188.

There can be no question as to the right of the Government to acquire and hold a large part of the stock of the Panama Railroad Company.

The objection that Congress has authorized a purchase from the New Company only and not from the *liquidator* of the Old Company is unsound. A law must have a reasonable interpretation in view of its object and not be rendered abortive if that can be avoided. The intention of Congress was to authorize the purchase of the canal property from the owner. Whether the title to the property is in the Old Company or the New is immaterial since both companies join in the proposed sale. The purchase will be from the New Company, and the consent of the *liquidator* of the Old Company will be at most a waiver of rights as to property transferred to the New Company.

DEPARTMENT OF JUSTICE,  
*October 25, 1902.*

SIR: The act of Congress of June 28, 1902, entitled "An act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans," having authorized you to purchase the rights and property of the New Panama Canal Company of France and to construct a canal across the Isthmus of Panama, in case you should find that a satisfactory title can be given to the United States by the company, and certain arrangements made with the Republic of Colombia, with an alternative provision as to what is known as the Nicaragua Canal route, I have, by your direction and to enable you to perform the first part of the duty so imposed upon you, made an examination of the title proposed to be given by the company, and respectfully submit my opinion thereon.

To make this more intelligible, I think it well to premise a brief summary of the history of the company, of its relations with another Panama canal company of France, and of the negotiations and preparations which have been set on foot looking to a sale to the United States.

In 1878 a contract of concession, which has since been renewed from time to time, was entered into between the minister of foreign affairs of the Republic of Colombia and Lieut. Lucien Napoleon Bonaparte Wyse. In the same year it was approved by a law of Colombia. This contract of concession (see Exhibit C) describes Lieutenant Wyse as a member and delegate of the committee of direction of the civil International Interoceanic Canal Company, presided over by Gen. Etienne Türr, and the acceptance of Lieutenant Wyse was in the name of that company. The concession was of the exclusive privilege to excavate across the territory of the Republic, and to operate for ninety-nine years from its completion, a maritime canal between the Atlantic and Pacific oceans. The canal was to be completed and opened to public use within twelve years after the date of the "formation of the universal anonymous company which shall be organized to construct it," and the executive power of the Republic was authorized to extend this time six years, in case it should be found impossible to finish the

canal within twelve years. The public lands necessary for the excavation of the canal and for the construction of a railroad, if it should be found convenient to construct one, were granted, the lands to return to the Republic, together with the canal and railroad, at the expiration of the concessionary period. There was also granted a strip of land 200 meters wide on each side of the canal; also 500,000 hectares of public lands, with the mines that might be in them, to be selected by the company. The canal was to be neutral, a maximum of charges was fixed, and the Republic was to receive certain annual payments of money during the life of the concession. The concessionaire was authorized to make an arrangement with the Panama Railroad Company, and there were other details favorable to the concessionaire, Colombia, and the general public which might use the canal.

This contract of concession was by its terms transferable, but was absolutely forbidden to be ceded or mortgaged in any way to a foreign nation or government.

The concession was transferred by the concessionaire on July 5, 1879, to M. Ferdinand de Lesseps, founder of the Universal Company of the Inter-oceanic Canal of Panama, hereinafter referred to as the "Old Panama Canal Company." This company began the work on the canal and continued it until 1888, when, after the expenditure of a vast amount of money, it became involved in financial difficulties and was placed, in February, by the civil tribunal of the department of the Seine in France (see Exhibit H) in charge of a liquidator, who was authorized, among other things, to contribute or turn over the assets to a new company, the organization of which was then contemplated, and which will be referred to hereinafter as the "New Panama Canal Company."

On December 26, 1890, a law of Colombia (Exhibit C) granted to the liquidator of the Old Panama Canal Company a prorogation of ten years for the completion of the canal, providing as a condition that he should transfer the whole of the assets of the company in liquidation to a new company, which was to undertake the completion of the work, and that the new company should be organized with a sufficient capital, and should recommence the work of



excavation not later than February 28, 1893. This new law confirmed the contract of concession of 1878, and provided for the receipt by the Colombian Government of 10,000,000 francs and 50,000 shares in the proposed new company.

A law of Colombia of 1892, by article 1, authorized the Executive authority to modify the contract of December, 1890, between the minister of foreign affairs and the liquidator, concerning the prorogation for the opening of the canal, and by article 2 authorized the Executive to extend the time for constituting the proposed new company and recommencing the work, and provided: "If the Government does not make use of the authorization given by article 1 of the present law, it is fully empowered to make a new contract, which will not require to be approved by Congress."

The Executive made a contract in which a greater time, viz, until October 31, 1894, was allowed for constituting the new company and beginning the work, and it was therein declared that the term of ten years mentioned in the prorogation of 1890 should begin upon the organization of the company. The time for the beginning of the ten years had not been specifically mentioned in the law of 1890. No subsequent law of the Colombian Congress on the subject has been found.

The new company was constituted definitively on October 20, 1894. (See Exhibit J.) This would accordingly make the ten years end in October, 1904.

The Executive power of Colombia, in April, 1900, undertook to grant to the New Panama Canal Company a further extension of six years from October, 1904. (See Exhibit C.)

After the judgment of the civil tribunal of the Seine of February 4, 1889, appointing a liquidator of the Old Panama Canal Company and authorizing him, among other liquidation proceedings, to contribute to the projected new company the assets of the former, the liquidator continued the work of the canal as liquidator, entering into arrangements for that purpose with the contracting companies which had been engaged in excavating, until the formation of the new company in 1894, when he entered into a contract of con-

tribution with the founders of that company to turn over the assets.

This contract took the form of stipulations in the by-laws of the New Panama Canal Company, articles 5, etc. (Exhibit I.) These articles declared that the liquidator contributed to the new company all the rights which had resulted for the company in liquidation from the laws, decrees, and other acts of the Government of Colombia; all the works, plants, workshops, buildings, hospitals, matériel, etc., belonging to his company; all the plans, drawings, studies, and documents of all kinds concerning the construction or operation of the canal; the benefit of all contracts with third persons; all guarantee funds on deposit; the whole to be the property of the new company. The articles also contributed a large majority of shares of stock in the Panama Railroad Company, a New York corporation, which shares had been purchased by the company in liquidation; but this last contribution was conditional; that is to say, should the canal be duly completed it was to remain good, but should the canal be attempted and partly constructed by the new company, but not completed within the time allowed by the concession, the shares were to return to the liquidator; and should the new company vote not to attempt the construction of the canal, or vote to raise money for that purpose but fail to get it, then an indemnity of 20,000,000 francs was to be paid to the liquidator and the railroad shares to belong to the new company.

This contract of contribution stipulated in favor of the liquidation of the old company 60 per cent of the net profits of the enterprise, and this was to be reduced to 50 per cent if the canal should not be attempted and if the unconditional title to the railroad shares should be acquired by the new company in the manner that has just been explained. (See Exhibits L and I.)

The rights as to the railroad shares were to remain inalienable by the New Panama Canal Company until payment of the 20,000,000 francs or the complete construction of the canal within the time allowed by the concession. There was also reserved to the liquidator the right to a commission of inspection to examine the proceedings of the new company.

In the interval between the appointment of the liquidator in 1889 and this contract of contribution of October, 1894, divers suits were brought against the liquidator, which were the more embarrassing because of the legal character of the Old Panama Canal Company. He accordingly applied to the French Parliament for a special law to regulate the liquidation of the company, and such a law was passed on July 1, 1893. (Exhibit B.) This law will be frequently referred to hereinafter.

In the course of raising funds the Old Panama Canal Company had issued a great number of bonds of different kinds. (See Exhibit 13.) The last issue before the company went into liquidation was an issue of what have come to be known as "lottery bonds"—that is to say, bonds which were also in a sense lottery tickets. These were authorized by another special law of France of June 8, 1888. (Exhibit F.)

Of the money received from the subscribers of these bonds, namely 360 francs each, the Old Panama Canal Company took 300 francs and 60 francs were turned over to another company, to be invested and to provide both a sinking fund to reimburse the bonds from time to time, and in the meantime to furnish funds to pay the prizes of the lottery. This company is still in operation. Its members are the subscribers to the lottery bonds themselves. (Exhibit 13.)

Another special law of France after the dissolution of the Old Panama Canal Company authorized the liquidator to issue some of the same lottery bonds.

The bonds in his hands unissued were not among the rights contributed by him to the New Panama Canal Company.

The latter company resumed the work on the canal immediately upon organizing itself, having taken in a cash capital of 60,000,000 francs, subscribed by divers persons, including some of the old contractors, some of the bondholders and stockholders of the old company, and some outside persons, and has continued the work until the present time.

The liquidation of the Old Panama Canal Company has likewise continued under the special law of July 1, 1893, concerning it.

In 1901 the question of a purchase of the rights and property of the New Panama Canal Company by the United States

was much discussed in France and the United States, and on January 9, 1902, an official offer (see Exhibit T) was made by the officers of that company to sell to the Government of the United States all the property and rights of the company on the Isthmus of Panama and its archives in Paris for \$40,000,000.

This offer had been authorized by vote of the general meeting of stockholders of the company (see Exhibit T), and the liquidator and the official representative (called the "mandataire") of the bondholders of the Old Panama Canal Company, whose appointment had been provided for by the special law of July 1, 1893, announced their consent to the sale in formal proceedings in the civil tribunal of the Seine, by which that law required all acts of the liquidator tending to alienate the assets of the old company to be approved.

The civil tribunal of the Seine approved such consent of the liquidator by a judgment of March 19, 1902. (Exhibit 4.)

A division of the \$40,000,000 between the new company and the liquidator was settled by arbitration, and the submission by the liquidator of this matter to arbitration was approved by another judgment of the civil tribunal of the Seine, dated August 2, 1901. (Exhibit O.)

One of the bondholders of the Old Panama Company, a M. Donnadiou, went into court and asked the civil tribunal of the Seine to set aside and annul its own judgment approving the consent of the liquidator to the sale to the United States and questioning the new company's right to sell; but the tribunal, by judgment of July 3, 1902 (Exhibit 5), decided that he had no right of action, because, under the special law of 1893, he was represented for such purposes by the mandataire of the bondholders, and that he had no right to question the power of the New Panama Canal Company to sell, having no legal relations with that company.

This judgment was confirmed upon the same reasons given below, by judgment of the court of appeals of Paris of August 5, 1902. (Exhibit 6.)

For convenience in pursuing the investigation, all objections known to have been stated in Congressional debates and elsewhere to the satisfactory character of the title pro-

posed to be given by the New Panama Canal Company to the United States were formulated. (Exhibit 1.) These were in the same terms communicated to the officers and lawyers of the company, in order that, while the investigation was pursued and the conclusions herein stated reached independently of them, they might draw up and submit whatever they saw fit by way of comment upon those objections. They have recently handed me a legal opinion or brief, a translation of which is among the papers hereto annexed. (Exhibit 2.)

In addition to taking that step we have obtained, independently of them, a special stenographic report of the oral arguments made in a recently decided case in the court of appeals of Paris, in which the sale of the canal property was opposed by one Donnadieu, as already mentioned. (Exhibit 6.)

The objections referred to, except the last, which is that Congress authorized a purchase only from the new company and not from the old, whereas it is alleged that the property has become again that of the old company, resolve themselves into reasons in support of the following propositions:

1. That the new company has not power to sell the canal and railway property.
2. That the liquidator has not power to consent to such sale.
3. That the French courts have not power to authorize the liquidator and new company, or either of them, to enter into the sale.
4. That, at all events, the United States would take the property as a trust fund subject to the total obligations to the stockholders, bondholders, and the other creditors of both companies.

It will be convenient to examine the law bearing upon these four propositions in their order.

I. The first is: That the new company has not power to sell the canal and railway property.

This requires a brief statement of the history and nature of such a company, in view of the law of France.

Our conceptions of charters and corporations and privileges enjoyed by corporations, as well as the notion of their

being unable to act beyond the ability infused into them by their charters, are here very misleading, but, notwithstanding this, there are abundant conceptions belonging to our system which can enable us to understand these French associations.

There once existed in France concerns similar to our corporations, taking their character from royal and feudal institutions, but it is to be remembered that France passed, more than a century ago, through a revolution in which almost everything of that kind was destroyed as though by fire.

It was one of the acts of the French Revolutionary Convention to declare "the liberty of industry."

The New Panama Canal Company is an anonymous partnership or association, composed of shareholders (*Société Anonyme par Actions*), which, in view of its object, is of a non-commercial or non-trafficking kind, but subjected by a law of August 1, 1893, to an act concerning commercial associations passed in 1867, and to the commercial code and the customs of commerce. All anonymous associations formed since August 1, 1893, are subject to the same, and are, legally speaking, commercial, though in fact not so.

The old company is an anonymous partnership which voluntarily took the form of an anonymous association of shareholders, but is not ruled, and never was ruled, by the law of 1867 or the code and customs of commerce, but only by the Civil Code, having been formed before August 1, 1893, and not being commercial in its object or business.

Anonymous associations or partnerships have not the names of the partners, but a name merely descriptive of their object or business.

The essential or fundamental nature of both companies is that of voluntary partnership, as we understand that. The powers, accordingly, are those which an individual Frenchman has under the general rules of law—an individual merchant corresponding to the new company, and an individual who is not a merchant to the old company. As an individual can sell what belongs to him to whomsoever he pleases (unless some third person has a claim such as properly warrants him in opposing the sale in order to subject the prop-

erty to a debt owing to him, or the like), so one of these associations of either kind can ordinarily dispose of its property.

In the case of commercial associations proper, to which the new company, the one we are now considering, has been assimilated and added by the general law already referred to of August 1, 1893, the legislature of France, in view of the usually large capital and the great number of stockholders, bondholders, and other creditors, has imposed a few restrictive rules (act of 1867 and amendment of August 1, 1893, Exhibit 3) for the greater security of the partners and of third persons, requiring publication of the by-laws, a certain amount of stock to be represented at certain stockholders' meetings, the paying up of subscriptions, etc.; but these do not change the essential character of the concerns as partnerships; do not establish any tie between them and the Government, or any obligations from them to the Government, and do not forbid the exercise of the liberty to dispose of the property of the concerns as freely as an individual is able to dispose of his, if no special law forbids and if he is solvent and not under some particular contractual or other like obligation to retain the property. This New Panama Company is quite solvent.

The act of 1867 already referred to provides, in section 21, the first section under the title of "Anonymous associations," as follows:

"21. In the future, anonymous associations may be formed without authorization by the Government. They can, whatever may be the number of the associates, be formed by a document of a private character ("sous seing privé") made in duplicate. They are subject to the provisions of articles 29, 30, 32, 33, 34, 36 of the Code of Commerce and to all provisions contained in this title."

Lyon-Caen and Renault, *Treatise on Commercial Law*, say that "the law of 23d of May, 1863, modified the code's requirement of the authorization by administration to the extent of exempting from the requirement associations having a capital exceeding 20,000,000 francs; \* \* \* the law of 1867, which has repealed the law of 1863, has not set anonymous associations free to constitute themselves and to

perform their functions as they may see fit. In the interest of stockholders and third persons it has imposed some rules (articles 41, 42, 47) which, from the nature of things, are much the same as those that same law has established for associations of commandite par action. The legal regulation of the two kinds of societies par actions (that is to say, having stock) has thus become the same in this, that since then neither of them is submitted to a previous authorization or to the surveillance of the administration, but they enjoy only *a liberty regulated by the law.*"

In a judgment of July 19, 1899, the civil tribunal of the Seine, in deciding a controversy between the liquidator of the Old Panama Company and the company formed in 1888 to take care of the so-called lottery bonds, discussed the different situation of a civil association formed before 1893, such as was the Old Panama Company, and that of a more recent association, and held that the civil association for taking care of the bonds did not "come under the control of the law of July 24, 1867, which applies only to commercial associations. \* \* \* That it is the Civil Code alone which rules the civil associations to determine the rights and suits of those interested, whatever form those civil associations may have taken in order to constitute themselves; that the agreement shown by the by-laws, accepted by all and by the company of Panama itself, is, therefore, *the law of the parties*; that it has been observed in the calling and in the composition of the extraordinary general meeting of July 25, 1898, which, consequently, can not be criticised from this point of view."

But we are at present discussing the power of the new company to sell, and it would seem to follow from what has been said that it has the power, just as an individual would have power to sell his property, unless some special statute has forbidden this or made it unlawful, since it is a solvent company without bondholders, as appears from its annual reports hereto appended. (Exhibit N.) It is essentially a partnership, subject to a few statutory regulations about entirely different matters.

It has been suggested, however, that its contractual obligation to the old company to pay 60 per cent of the earnings



of the canal restrains it. And this may well be true; but this contractual obligation of a partnership is the same as though an individual had agreed to complete the canal and to pay the 60 per cent, and is therefore such an obligation as can be released by the other contracting party. If so effectually waived by the other contracting party, no one else could complain or question.

Being a merely contractual obligation of a private partnership for the benefit of another private concern, there is no principle of law which would make the new company unable, with the consent of the other contracting party, to make use of its liberty to dispose of what belongs to it. There is no lack of power, or vires.

Whether from the point of view of the bondholders and other creditors of the old company, and the power of the liquidator, it is just and lawful for him to set free the new company is a question to be separately discussed hereinafter.

It has also been suggested that the so-called lottery bond law of 1888, providing—"ART. 3. All machinery necessary for the accomplishment of the work shall be made in France. The raw materials shall be of French origin"—is a special law containing, by some implication, a prohibition to the new company to sell to one who could not be expected to be subject to such provisions of law, or else subjecting any purchaser of the property of the new company to those provisions, so that he would be bound to proceed accordingly.

It has, besides, been supposed (but enough has been said to indicate the error of that) that this law of 1888 is proof that the Government of France is represented by or bound up with companies generally in such a way that the express consent of that Government is necessary to authorize any sale of the whole of its property by the new company.

This law was purely exceptional, intended to give an unusual right to the old company in the matter of issuing bonds, which are in effect lottery tickets also, lotteries having been prohibited in France by a law of 1836.

The Government, as a compensation to the nation in general for permitting this unusual thing, required the company so specially privileged and benefited to use French machin-

ery and materials. But in view of the general relations of the Government to these free partnership associations, it would be going a long distance to see in this an order intended to be addressed to any individual or other *purchaser of property* from the company which was thus given the benefit of the unusual privilege, and still more to deduce a mortgage or a lien attaching to any property it might sell into whosoever hands it might come.

The French legislature by act of 1889—the company having dissolved and ceased to require to any great extent machinery and raw materials—passed another law authorizing the liquidator to issue some of the unsold bonds, but, of course, as bonds of the old company, which still existed for the purposes of liquidation, and providing that in case the liquidator should transfer or cede its assets to a company organized for finishing the canal, the new company should not issue the bonds which might at that time remain unsold otherwise than on the conditions determined by the law of June, 1888, concerning the minimum of the selling price and the payment of interest.

But the new company has remained a stranger to the lottery-bond scheme. It has not enjoyed the privilege of issuing those bonds; the still unissued bonds have been retained by the liquidator and were not contributed by him to the new company, and they are no part of what it is now proposed to sell to the United States.

The nature of the provisions of law concerning materials and machinery is such that the requirement to obtain these in France was not in any way to benefit the bondholders or any other specific individuals, or even the French Government itself, but the people of France indefinitely.

The expected benefit was a vague and indefinite one, reserved by the Government as compensation for something which the now proposed purchaser would not get, viz, the privilege of issuing lottery tickets as an inducement to a loan the company had already a right to get; and only the Government of France, which is acquiescing in the proposed sale, with a full knowledge that the foreign purchaser would not think of going to France for his materials, could ask that such materials and machinery should be purchased in

France. No bondholder or stockholder or creditor can ask, or could possibly desire to ask, that that order burdening the old company should be transferred to a purchaser. It seems to be clear that no request from the French Government will be, or could justly be, made; and further, that if, by the law of 1888, the legislature intended to say that any remote *purchaser* of property from a free partnership concern must be a person subject to the laws of France, or that no sale to a *foreign* company or concern could be made, the legislature used no word to express that idea. The United States will not be a French successor of this French company, enjoying French privileges and bound by French law, but a foreign purchaser of property belonging to it in a foreign country.

It may be remarked, in passing, that so far from the canal project and undertaking being those of the Government of France as a Government, it is clear that the concession by Colombia was made, not to France, but to private persons and a private company, and that the concession itself forbids the belief that Colombia was willing, at the time, to make the concession to or for any foreign government. The canal is not in France, but in Colombia. It is not built in pursuance of the governmental obligations of France to provide highways in France for the French people. It is, in short, a canal of great public interest in Colombia, which fact led Colombia to declare it a work of public utility, so as to authorize the private concessionary to make use of what we call the right of eminent domain, or forcible expropriation of private property; but, as far as the nation and Government of France are concerned, it is a canal in a foreign country partially constructed by a private French concern in the nature of a free partnership.

France could have prohibited the French private company from selling to outside persons or concerns, if it desired to retain the benefit of the purchase of materials in France, but France can not make laws directly binding either outside persons or property in Colombia after it ceases to be owned by Frenchmen. However, France passed no such law, and such companies, as we have shown, are left by her

as free to sell what they owned either to Frenchmen or foreigners as individual Frenchmen are.

But it is not sufficient to show that there rests in the New Panama Canal Company, or in its associates or stockholders, *somewhere*, the right to make this sale, or divest themselves of their rights in favor of a new concessionary of Colombia, so far as their powers under the law of France are concerned.

It is still necessary to know that the "general meeting" of stockholders, so called, which has authorized the offer, reserving the right to itself to ratify the sale, has the power to so offer and ratify that sale, and that it is not necessary to have unanimous action by the shareholders.

The "general meeting" of stockholders receives its powers from the by-laws, and the by-laws are made by the original stockholders or founders. It should always be kept in mind in this connection that they are partners who have associated upon certain terms and that a partnership agreement can not be changed by less than *all* of the partners.

Sometimes the by-laws (*statuts*) delegate authority to the "general meeting" to alter those by-laws in certain specified particulars. When that is done the general meeting is, as it were, both a constitutional convention and a legislature of the association.

The Government of France, prior to 1867, authorized, through the executive administration, the by-laws of commercial associations, to which the New Panama Company, created in 1894, has been assimilated by the act of August 1, 1893; but, as I have said, from 1867 only certain very general regulations were prescribed by statute, and otherwise the founders were left free to make such by-laws as they saw fit.

There is nothing in the act of 1867 or the amendment of 1893 forbidding the most extensive powers to be conferred by the by-laws of the founders upon the general meeting.

On the contrary, the authors already quoted (same volume, sec. 864) say that the question is much discussed whether, in the absence of any delegation of power by the by-laws—i. e., when they are silent on the subject—the general meeting has not this power of alteration. They say

it is pointed out that if "unanimity among the stockholders is required, alterations of the most necessary character to the carrying on and development of the association will be rendered difficult, even impossible." They say that it is also claimed that in the general meetings, which have to deal with questions concerning a collective personality, there should be power to lay down the law, because the persons composing the association have renounced their individual rights in favor of the collective interest. They add, however, "We think, on the contrary, that, in the absence of a formal clause in the by-laws, alterations in them can not be made except with the *unanimous* consent of the shareholders."

It happens that the by-laws of the New Panama Canal Company are not silent, but expressly give very extensive powers to the general meeting which proposes to make the sale. Title 9 of those by-laws (Exhibit I), under the heading "Amendments to the by-laws—Liquidation," has the following:

"ART. 60. If experience shall show the expediency of modifying or adding to the present by-laws, the general meeting shall proceed to do that in the manner set forth in articles 61 and 62 hereof.

"It may especially decide in regard to a reduction of the capital stock; a reduction of the fixed duration of the association, an extension of it, or an *earlier dissolution of the association*; its fusion with other associations; it may even effect all and any modifications bearing upon the object of the association without, however, altering its essence.

"ART. 63. In case of the dissolution of the company, the general meeting, on the proposal of the council of administration, determines the method to be adopted for liquidating or for the constitution of a new company; it appoints the liquidator or liquidators, and can give them the most extensive powers."

Articles 61 and 62 referred to contain merely details (taken from the regulations of the act of 1867) as to the composition of a general meeting capable of carrying out article 60.

It would be a violation of article 60 to use the funds of

the association to build a canal in Spain. That would essentially alter the object or business to be carried on.

The general meeting thus has the power to amend or add to the by-laws in any way not altering the business to be carried on, and therefore to adopt by-laws giving itself or the president or council of administration any powers concerning the sale of the assets that it sees fit to give.

Having all the powers of the shareholders, with the single exception above mentioned, I do not see that a resolution directly authorizing or ratifying the sale, if published in the manner required for amendments of the by-laws, would be contrary to any law, violative of anyone's rights, or in excess of the powers given to the general stockholders' meeting by the by-laws above quoted.

This great power was properly conferred by the founding partners because of the impossibility of getting together for unanimous consent the hundreds of thousands of partners.

II. The next of the four propositions is—

2. That the liquidator has not the power to consent to such sale.

This involves somewhat more complex problems, but they do not seem to be difficult of solution.

It might be sufficient to say that the civil tribunal of the Seine, given by the general law and the special act of July, 1893, jurisdiction of the persons and subject-matter, and being what we should call a court of general jurisdiction, *has decided* that the liquidator *has* the power to consent to the sale, and that the court of appeals, upon the appeal of the only person who presented himself or claimed to have presented himself within the time and manner allowed by that special law, has decided against him on appeal.

He has a right (during a period of two months, now running) to ask the Court of Cassation to nullify the judgment on appeal, which held that even he had not presented himself in due time and manner and that he had no right of action, even if he had been in time. But in view of the objections which I have mentioned in the beginning of this paper, it may be well to explain the validity of the judgment or decision that the liquidator has the power to consent to the sale, its

conformity with French law, its reasonableness, and its effects with regard to the stockholders, bondholders, and other creditors of the old company.

What is this liquidator and what are the powers of such liquidators?

The Civil Code, which, as we have seen, regulates the affairs of such civil companies, contains very little with regard to their liquidation or winding up, and almost nothing in restraint of the liberty of the partners. (See title 9, "Of the contract of association.") It is almost wholly confined to the general rights and relations of individuals. It contains nothing about corporations or joint-stock companies or other artificial and privileged concerns. Its provisions about the "contract of association" contemplate a mere voluntary partnership instead of a statutory or artificial body in which the stockholders have a limited liability, and apply to any and all free partnerships. They should be read in the light, first, of the freedom of contract; and, secondly, of the principle that third persons can be bound by ample notice of the nature of the freely made partnership with which they may deal. As the authors already quoted say, there is nothing in the Civil Code or elsewhere to forbid (see secs. 1077-1082) a mere partnership from taking the form of a commercial association and letting the world know that its private contract of association or partnership contemplates a limited liability. These authors say: "We believe, on the contrary, that the law of 1867 [which contemplates limited liability of commercial associations] rules non-commercial associations as it does commercial associations having stockholders, though constituted before the law of August 1, 1893."

We have seen, however, that the civil tribunal of the Seine has held that it does not, and those authors themselves say that the greater number of judicial decisions are that way.

But it is recognized by these authors, and in the decisions of the civil tribunal of the Seine, that the *bankruptcy laws* and the laws concerning the statutory institution known as "judicial liquidation" have no application to the non-commercial associations constituted before August 1, 1893,

and that the question of their liquidation is left altogether to the Civil Code.

The Civil Code, in turn, leaves it to the will of the proper tribunal and to the general provisions of law applicable to individuals, and especially to individuals in the case of succession after death. About the only express provisions in the Civil Code on the subject are the following articles:

“1871. The dissolution of associations having terms [of duration] can not be demanded by one of the associates before the expiration of the terms unless upon just grounds, as where one of the associates has failed to live up to his engagements, or where an habitual infirmity renders him incapable of attending to the affairs of the association, or in other similar cases, the legitimacy and importance of which are left to the determination of the judges.” (Civ., 1184–1865.)

“The rules concerning partition of successions, the form of such partitions, and the obligations which result therefrom among the co-heirs apply to partitions among associates.” (Civ., 792, 815 et seq., 826; Code Procedure, 966 et seq.)

The *liquidation* or ordinary winding up of *commercial* associations formed after 1867 is equally unregulated by statute, since it is neither settlement by bankruptcy proceedings nor settlement by what is technically “judicial liquidation.” The authors quoted say (sec. 412): “It is not only from the syndic [in bankruptcy proceedings] that the liquidator of an association differs, it is also from the judicial liquidator named in virtue of the law of March 4, 1889.”

And in section 364 they say: “The Code of Commerce (art. 64) supposes, it is true, an association in liquidation where it speaks of associates who are not liquidators. Article 61 of the law of 24th July, 1867, also expressly mentions liquidation. But *no French statute has defined the state of liquidation, nor established the rules to govern it; jurisprudence* (that is, judicial decision) *has had to supply that omission, drawing inspiration from the general principles of law and the necessities of practice.*”

It appears that the matter of liquidation or winding up



being left thus to the courts, they have, in a general way, followed the same plan for civil or non-trading associations voluntarily constituted in commercial form before 1893, such as the Old Panama Company, as in the case of commercial associations or the associations assimilated to them, created since 1892.

Bankruptcy law, to repeat, applies in any event only to commercial companies and individuals; the quasi-bankruptcy proceeding called "judicial liquidation" is equally inapplicable to this Old Panama Company, a non-commercial company created before 1893. We have simply a dissolution and settlement of a partnership by the partners, if they can agree unanimously, and if they can not, then under the power of the courts on general principles of law, *ex necessitate*.

But what is left to the courts is the resolution of questions which the laws do not themselves resolve, and the necessities of the case nevertheless require to be resolved. This is very little, and we are not to understand that because the partners can not agree and the courts must be resorted to, the rights of all concerned, even their rights of action, are ended or subject to the mere caprice of the judge. It is quite otherwise. The Civil Code and the statutes and recognized maxims govern as before, so far as it is possible to apply them. Ordinarily all that the court does is to appoint a liquidator, and authorize him generally to liquidate as he deems best.

The partnership is dissolved, though in a sense continuing to exist (same authors, 372). Being resolved into its units, equal and having rights well determined by the code, they liquidate themselves if they can *unanimously* agree, or where their by-laws have provided for the choice of a liquidator by the general meeting (as they usually do), he liquidates. In cases in which they are not unanimous or have not provided for a liquidator, necessity requires the court to name one (same authors, sections 368-369, where it is remarked that foreign codes differ in permitting a mere *majority* to decide, if a majority can agree upon a liquidator); and he is not an officer representing the court, but the judicially

selected representative or agent of the associates to settle or wind up their affairs.

The associates could give him all their unlimited powers of liquidating. If they do not meet and agree unanimously—and this is obviously impracticable among several hundred thousand scattered stockholders—then the court gives him general powers or determines, from among the *powers of the associates or partners*, what ones are to be given, and these are confined to the requirements of liquidation or winding up.

This course, as I have said, is regarded as *necessary* to reach a liquidation and the partition to which the individual associates or partners are entitled (the code not having provided any method of reaching those ends) in the absence of the concurrent, unanimous action of the associates or partners.

If the creditors are dissatisfied they can (but not in the case of this non-commercial association, constituted before 1893) apply for a declaration of bankruptcy.

The authors already quoted say (secs. 377-379):

“Foreign laws, which have concerned themselves with the liquidation of associations, have determined the powers of the liquidators and their obligations; it is not so with us, for the simple reason that our Code of Commerce [and the same, as I have said, is true of the Civil Code] has not treated of liquidation. As has been said above, it belongs to the associates or to the tribunal, in naming a liquidator, to determine his obligations and his powers. But it is important to inquire what they are, in case the act of appointment is silent or incomplete on the question. \* \* \* The liquidator is an agent; he is chosen by the associates, or by the court, to represent the dissolved society, to the end of terminating its operations, paying its creditors, recovering the debts owing to it, and thus getting at the net assets which are to be partitioned among the associates. \* \* \* It is necessary to admit, without restriction, that it is only the association (not the creditors) whom the liquidator represents. It is not necessary to argue otherwise from *judgments which confer powers the most extensive* upon the liqui-

dators for the realization and partition of the assets. The extent of the powers of the liquidator can not take from the functions he performs their essential character. As has been justly remarked, however considerable we suppose the powers of the liquidator, they can not exceed those which belong to the associates themselves. Who, however, can regard the associates as the agents or representatives of their creditors."

By a judgment of 4th February, 1889 (Exhibit H), a liquidator was appointed, in pursuance of article 1871 of the Civil Code (above quoted), for the Old Panama Company, for the reason that it was in difficulties, practically insolvent, that a vain attempt had been made to obtain an extraordinary general meeting, that the by-laws did not intend to, and could not, deprive a shareholder of the right which article 1871 gave him, etc.; and the liquidator's appointment was "with powers the most extensive, especially to cede or contribute to any new association the whole or part of the association's assets," etc.

He was not, however, authorized by the court or by the special act of France of 1893 to reorganize the old company, and has never undertaken to do so. That would not be liquidating.

It seems to have been supposed that the broad power given is something very extraordinary and of doubtful validity. But the doubt, if there be one, is certainly not as to the power to get rid of all the assets. It is rather, it seems to me, as to the power to do other than that, viz, to contribute to another company, with the result of an indefinite postponement of the end of the liquidation or winding up; not as to the power to turn over, or consent to have turned over, to a purchaser for cash the original or exchanged assets of the company, but rather as to that of beginning and continuing the agreement of contribution with the new company looking to future work on the canal. Certainly, to sell the property and obtain cash with which to pay the creditors and satisfy the demands of the associates for a partition of what remains, if anything, is one of the most ordinary and obvious methods of liquidating in all countries.

However, either course would seem to be within the limits of legitimate liquidation. The one adopted appeared to promise more to the creditors and stockholders than that of selling off-hand the remains of a discredited enterprise and some machinery of little or no value for any other uses.

But it seems to be supposed that, having made a contribution which transferred the ownership of the canal property to a new company for the price of 60 per cent of the net earnings of the completed canal, the liquidator can not, under his original powers or under any power the court can add thereto, sell or dispose of or release for a cash consideration this 60 per cent of expected earnings.

It is difficult to see wherein this property or right is more sacred or inalienable than the canal itself, which was disposed of by the liquidator in 1894 to the new company.

If it is a debt owing to the old company, represented by the liquidator, it is an asset of a very ordinary kind, such as a liquidator collects, compromises, exchanges, or otherwise disposes of as seems best for his principals. That is what it amounts to, so far as all but the railroad property is concerned, for the agreement of contribution, as embodied in the by-laws of the new company, expressly provided that—

“The present corporation shall *become owner* of the property and rights hereby ceded and contributed on and from the day when it shall have been finally constituted, except, however, what is to be stated hereinafter in regard to the Panama Railroad.”

Neither is it apparent why, if the tribunal could have originally authorized a sale of all the property or assets of whatever kind, it has any less power to do so now.

If the title to the railroad stock is in any sense still in the old company, all the more clearly it can be sold by the liquidator as an ordinary unexchanged asset, or quit-claimed by him to a purchaser from the new company.

But it has been suggested that the supposed action of the liquidator is a bad bargain for the associates and with regard to the creditors of the old company; that he would be wiser to take his chances on the 60 per cent profits of the Panama Canal to be (possibly) constructed by the French company,

than accept the certainty of a cash payment equal to the present value of the canal, the concession, and the other property.

Can the validity of the sale or disposal of every piece of property embraced in the assets of a failing partnership depend upon the wisdom of it, or the validity of the court's authorization of such sale depend upon that? Who, moreover, is to judge of the wisdom of this act?

The liquidator has decided, the court has approved his decision and published its approval, as the special act of July, 1893, required, and but one among the stockholders and creditors attempted to make use of the right to attack the judgment of approval, and that one, a bondholder, was told that his legal representative had appeared in court and expressly approved the act and in so doing represented his interests as one of the bondholders, in pursuance of the special law of France. Not one of the general creditors (if there are any such) objected, and the *mandataire* or representative of the bondholders has repeatedly and formally approved.

Under these circumstances, it is to be presumed in fact that the course is a wise, or, at least, reasonable one, from the standpoint of those who are selling, even if it can be imagined that its wisdom or unwisdom has any bearing upon the validity of the sale.

The bondholder, Donnadieu, who attacked the judgment of March 19, 1902 (Exhibit 4), approving the liquidator's consent to the sale, was decided against on July 3 last (Exhibit 5), and the court of appeals of Paris reheard the case and, adopting the reasons of the lower court, repeated the decision against him on August 5 (Exhibit 6).

The judgment of approval of the consent of the liquidator to the sale was rendered on March 19, 1902 (Exhibit 4), in pursuance of articles 10 and 11 of the special law of July 1, 1893, which are as follows:

"ART. 10. All acts tending to alienate any assets of the company, all contracts entailing a transfer or contribution of the whole or of a part of the assets of the concern, emanating from the liquidator of the Universal Company of the

Interoceanic Canal of Panama, shall be *subject to the approval* of the civil tribunal of the Seine, which shall, on the report of one of the justices, pass upon the question in open court.

"ART. 11. All *decrees of approval* or ratification rendered in accordance with the preceding article shall be *published*, within a term of ten days, in the '*Journal Officiel*' and in the '*Journal Officiel*' (*Commune edition*).

"This decree may be attacked by the *shareholders*, by the *mandataire* of the bondholders, and by *other creditors* of the company, within a delay of not exceeding *one month* from the date of the publication aforesaid. The civil tribunal shall adjudicate the question within the space of one month, as in the case of matters demanding an immediate and summary adjudication. The *appeal* from such decision must be entered *within ten days* from the time of notification of said judgment to the party in person or at his domicile."

This did not confer power upon the liquidator. It restrained the practically unlimited power he already had by subjecting some of his specific acts to the judicial approval.

The words briefly translated into the word "attacked" in article 11 are "*frappé de tierce-opposition*." Donnadiou, the bondholder of the old company, has made this attack upon the judgment of approval, or attempted to do so.

This proceeding called "*tierce-opposition*" is one by means of which a person who is *not* party to the suit, but believes his rights violated or injured by the judgment, can have it set aside. It can not, under the general law, be made use of by one who, though not actually a party, has been *represented* by one of the parties. The special law concerning the liquidation of the Old Panama Company, however, seems to have extended it to the stockholders of the old company, although represented by the liquidator, and to have extended it to any possible general creditors (not bondholders), although apparently represented by the *mandataire* of the bondholders, as may be inferred from the second paragraph of article 1, taking away, or rather suspending, their rights of action and permitting them to sue only in case the *mandataire* neglects or refuses to do so. But whether general creditors are represented is obscure and not important

in regard to the present inquiry, since the general creditors were permitted to oppose the judgment of approval and did not resort in any single instance to the "*tierce opposition*."

The special law, so far as the judgment of approval is concerned, is in some respects narrower than the general law, because, according to that law, there is no limit of time for the proceeding of "*tierce opposition*" by an outsider, and the time for appeals, which, under the general law, is two months, is cut down to ten days. In Beauchet's Treatise on Procedure in Civil and Commercial Matters (third edition, 1891) we read:

"1045. This extraordinary proceeding [*'tierce opposition'*] can be employed against any judgment, whatever may be its nature and the jurisdiction of the court pronouncing it. All the decisions in first instance, or final, of justices of the peace, '*prud 'hommes*,' tribunals of commerce, civil tribunals and courts [that is, courts of appeal] are subjected to it. The decrees of the court of cassation only are free from it, according to the decisions of that court. As a decree of the supreme court does not affect the basis or foundation [*fond*] of the litigation, it can not occasion any serious and real harm.

"1046. The law has not fixed any limit of time within which the *tierce opposition* must be instituted. It has left this point to the control of the ordinary rules of prescription. The *tierce opposition* can be employed as long as the right upon which the third party bases it has not been taken away by the effect of any prescription acquired against him, conformably to the ordinary law."

The ordinary methods of attacking a judgment, according to Beauchet's Treatise on Procedure (secs. 945, 946) are by appeal and opposition. Opposition is a request to the court entering a judgment on default to set it aside. There is no such judgment in the Donnadieu case.

The extraordinary methods are, according to the same authority, the "*tierce opposition*," the "*requête civil*," and the "*pourvoi en cassation*."

The "*requête civil*" is an attack upon a judgment of a

court of appeals only, based upon fraud or improper conduct in connection with the judgment. Nothing of the kind has been suggested, and this may be dismissed from consideration.

An appeal has been taken and decided against Donnadiou. (Exhibits 5 and 6.)

Tierce opposition has been explained—an application to have a judgment set aside by one not a party to its rendition, because it violates some legal right of his. Any judgment of any court can so be attacked, provided a right of the applicant has been violated, except judgments of the court of cassation. No one can, however, pretend that the appellate judgment against Donnadiou violates any right of his, because that affirmance can hardly affect any one but Donnadiou. Especially can not other bondholders or creditors of the old company escape the statutory obligation to file their own tierce oppositions within the month allowed by the special act, by attacking the affirming judgment against Donnadiou.

This leaves nothing to be considered but Donnadiou's proceeding in cassation, if he should institute one.

The proceeding in cassation is not a general appeal, or even a writ of error as we know the latter. The court of cassation annuls judgments and remands cases, where the judgments violate the law, almost wholly statutory.

His case has two parts—one between him and the new company, the other between him and the liquidator.

He alleged that his rights would be violated by the new company's selling the property, and brought suit to restrain it.

He alleged that the judgment approving the liquidator's consent violated his rights, and asked to have the judgment set aside.

Both parts were decided upon exceptions, instead of upon the two questions he thus sought to raise.

It was held that he was not allowed by the special law to file tierce opposition to the judgment of approval, because he was a bondholder and, as such, represented by the mandataire of the bondholders, and because the special law



allows tierce opposition only to the stockholders of the old company, the bondholders' mandataire, and the other creditors.

This is the plain reading of that law.

He does not deny that bondholders are unable to have the tierce opposition individually, but asserts that he is not a bondholder, but ceased to be one by getting judgment for the amount of his bonds, and so became one of the "other creditors."

Certainly an American court, without regard to the question of an alteration of his technical rights by getting a judgment of recovery on his bonds, would say that, within the meaning of the special law, he is a bondholder, and that he is not what is meant by that law as an "other creditor." The meaning or "spirit" of the law is as important to French courts as to ours.

The French courts denied that there had been any alteration of his rights, and held that a man does not cease to be a bondholder because he gets a judgment that his bonds shall be paid.

I see no reason to doubt that that sensible view is correct.

Donnadieu will fail to reverse the court of appeals on the branch of the case concerning the liquidator's consent, unless the court of cassation believes that the liquidator has not the power to dispose of the assets in question, with the approval of the lower courts, and concurrence of the mandataire of the bondholders, and further that his doing so violates some law on the subject of liquidation or some law giving rights to Donnadieu.

And even if it should so believe, if it also believes that Donnadieu's individual tierce opposition was inadmissible under the law—the only question decided by the judgment below—it would probably fail to annul the judgment refusing to admit him as being a judgment violating a law.

With the manner of exercising the liquidator's power of sale (if it exists) the lower courts have, but the court of cassation has not, anything to do.

That the liquidator has that power I have attempted to show, and shall merely add here that the special act of the French Parliament expressly recognizes and sanctions both

the power of the liquidator to alienate the assets—a power which liquidators the world over possess—and the authority of the lower courts to approve or disapprove a particular use thereof.

As for the branch of the case alleging that the sale by the new company was beyond the powers of that company the decision was that Donnadiou, being merely a bondholder or creditor of the old company, had no such legal relations with the new company as to be able to question the power of that company as to the disposition of its property.

A similar judgment (on default) has recently been rendered in the case of one Sautereau, an engineer, who claimed that certain plans of his had been furnished to the liquidator and would be included in the sale, and that the liquidator had not paid him for them. (Exhibit 7.)

It is needless to dwell upon this branch of the Donnadiou case, because, even if he had no such relations with the new company as to be able to raise such a question, there are others who can at least raise it—namely, the stockholders and creditors of the new company itself.

I have already indicated my opinion that they would raise in vain the general question of the power of the company, with the consent of the liquidator and mandataire of the bondholders of the old company, to sell the canal property. It is only necessary to add that a creditor of the new company, a solvent concern able and willing to pay any debts it may owe out of its funds or out of the purchase price, can not prevent a sale of the company's property under any principle of law or reason that has occurred to me, any more than an individual's debtor, if he is solvent, can prevent him from selling a horse or a house.

As for the stockholders of the new company, they, being the company itself, and bound by the acts of their own duly authorized general meetings and officers, could question nothing but the fact that their by-laws did empower the general meeting to make such a sale. I have already shown that, in my judgment, they clearly do.

III. But it is said that—

3. The French courts have not power to authorize the liquidator and the new company, or either of them, to enter into this sale.

It has been shown that they have undertaken to do so as to the liquidator, but the French special law of July, 1893, is itself questioned as to its validity, and the French judgments as perhaps violations of fundamental rights which are assumed to exist and assumed to be protected and guaranteed by French institutions.

The courts do not undertake to authorize the new company. That company needed no judicial authorization.

It is not perceived that the vested right alleged to exist in the 60 per cent net earnings in favor of the stockholders, but, in reality, beneficial to the bondholders and creditors of the old company, is any more of a vested right than the right to the machinery formerly owned by the old company, but transferred to the new. Of course, it is a vested and a valuable right. But the liquidation is still going on, and it is proposed to realize on that asset, to dispose of it for cash to be paid to the creditors and, after that, if sufficient (which it is not), to the stockholders. The stockholders are the debtors of the bondholders and other creditors of the old company, and they will, after the receipt of the price it is proposed to pay, be unable to pay their debts. They are so now; that is the principal reason for the liquidation of their concern.

But the act of July, 1893, does, so the French courts hold, exclude the bondholders from individually objecting to the sale—at least by formal proceedings in court. It has caused a single agent to be appointed for them, however, and if there were any general objection on their part, there is no reason to suppose that he would not act accordingly and voice their sentiments. This would not lead, necessarily, to a different result. The sale might well be approved, because their reasons were unsatisfactory to the court.

It may seem strange that the French special law of 1893, by some oversight, perhaps, permitted all the individual creditors, though possibly represented by the *mandataire*, and the individual stockholders, though certainly represented by the liquidator, to have a hearing in court, and yet omitted to give one to the bondholders individually.

But in view of the universal acquiescence of those general creditors (if any exist), having identical interests with the bondholders, and of all others concerned, including the legal representative of the bondholders, the probability is that the same end would have been reached by the court.

However, such is the law passed by the Parliament of France, and it remains to inquire whether it is invalid.

Nothing is more familiar to us than an adjudication by one of the courts that a law regularly passed is invalid, null and void. But when this first happened in our country it was regarded as a very extraordinary thing.

In France, as in England, certain maxims have come to be regarded as extremely sacred, and England is said to have an unwritten constitution. To some extent the same may be said of France. But it is not regarded as a necessary consequence that the power of the courts is sufficient to set aside a law which they regard as violating those maxims.

Beauchet, under the heading of "General notions," says:

"With Montesquieu, writers, jurisconsults, philosophers, statesmen, political assemblies, have discussed the thesis of the coexistence and distinction of three powers in the State—legislative power, executive power, judicial power. The number of writings to which this has given rise is considerable. \* \* \* Thus the principle of the separation of powers which, since the declaration of the rights of man, is considered as essential to every constitution, is applied not only to the relations of the legislative power with the executive power, but also to those of the judicial authority with the administrative, which is confounded, but improperly, with the executive power. Supposing, then, that there exist three distinct powers in the State, let us see rapidly how that separation has been established and what are the most important consequences which follow from it. The judicial power has been distinct from the legislative power since the decree of 16-24 April [August?], 1790, title 2, article 10. The subsequent constitutions of the 3d September, 1791, and 5th *Fructidor*, year 3, renewed that distinction, and article 127 of the *present penal code* has sanctioned

it. From the principle established by the law of 1790 flow the following consequences:

"1. The tribunals *can not oppose the execution of the laws*; they can not, as formerly could the parliaments, remonstrate.

"2. It is forbidden to the tribunal to imitate the ancient parliaments by declaring in advance and in a general manner in their decrees how they will decide in the future such or such a question of law and thus create a special law for their own jurisdiction. If attempts of that kind have sometimes been made, the supreme court has always suppressed them. (Code Civil, art. 5, Code Penal, art. 127.)

"3. All political deliberations are forbidden to the judicial bodies (law 30 August, 1883, art. 14, sec. 2). Reciprocally, all mixing in the administration of justice is forbidden to the legislative power. This rule leads to several consequences which it is sufficient to state:

"(1) The legislative chambers can not render any judgment except the Senate in a case provided for by article 12 of the law of July 16, 1875 (trying the President of the Republic).

"(2) The legislature can neither reform nor nullify a judgment, even one irregularly rendered. This right belongs only to the judicial authority obtaining jurisdiction by legal methods of proceeding.

"(3) A new law can not disturb a matter irrevocably adjudicated according to the preexisting law; the resulting situation constitutes an acquired right.

"(4) A new law can not deprive the tribunal of a proceeding instituted before it and of which it has jurisdiction, except in the case where the law announces the suppression of the tribunal itself.

"The judicial power is, in the second place, distinct from the administrative power, and every invasion of the domain of the administration is severely prohibited. Article 13 of title 2 of the decree of 16-24 August, 1790, the constitutions of 3d September and 5th *Fructidor*, year 3, are clear on that point. This prohibition is *in our day* sanctioned by the second section of article 127 of the Penal Code."

From these "general notions," as the author calls them,

it is evident that even the distinction between the three powers of government is a thing to be evolved largely from codes and statutes which the legislative power makes and alters as it thinks best. Nothing is more common than a law amending one of the codes.

In Riviere's French Codes, Ordinary Laws, Decrees, Ordinances and Opinions of the Council of State (thirtieth edition, 1902), a work which seems to be very complete—there is no regular constitution of France, as we understand the name; but in its place we find "laws constitutional and organic."

These were adopted in 1875, etc., after the establishment of the present Republic, and can be amended only by the general assembly, as they themselves provide. This general assembly is composed of the two chambers of Parliament sitting as one.

These constitutional acts are confined to the organization of the Government, and contain no provisions for the protection of private rights.

No older constitution is printed in the work, although here and there among the "ordinary laws" is an extract from some ancient constitution; among others, one concerning personal liberty and protection from arbitrary arrest.

It may be added, also, that the decisions of the French courts, as those of the English courts, refer to numerous maxims of fundamental justice or of settled practice in France, although it is practically true that French judicial decisions on points of law are mere interpretations and applications of *statutory* or *written* law.

Among the French maxims referred to is the one that no person can, in France, sue by an authorized agent, i. e., otherwise than in person.

But it is difficult to establish a negative, and it must suffice to say that authority to declare a law, regularly passed and proclaimed, ineffective has not been found to exist in the French courts. It may be added that Donnadiou might very well have resorted to an attack upon the validity of the special law of 1893, if such a power in the courts had existed: but he has made no suggestion of that kind.

It is not intended by this discussion to intimate that the special law of 1893 does violate any fundamental rights such as are looked upon either in France or the United States as sacred. On the contrary, it seems to be defective in regarding too much the rights of individuals and in leaving to the admirable rules of the Code Napoleon questions which might, to the advantage of all concerned, have been submitted to the discretion of the civil tribunal of the Seine, to the ultimate, instead of the merely conditional or provisional, determination of the *mandataire* of the bondholders, and to the decision of the liquidator. The winding up of the old company might well have been made more summary and more like a bankruptcy proceeding.

As it is, under that statute the original indebtedness of the old company remains, and will remain, entire as against it and its liquidator until the last franc is paid; the creditors are not all or finally constituted as a body or mass, as they are in case of bankruptcy in France; individual rights of action of all kinds were merely suspended and not merged or ended, and a host of difficulties, which one of our legislatures would probably have terminated without shocking the sense of propriety of American lawyers, were left to plague the tribunals. As an illustration, we see Donnadiou as late as 1898 undertaking to sue the *individual stockholders* of the old association for the amount of his bonds, and it is not at all certain that the attempt was unreasonable.

IV. But, supposing it proven or admitted that the title of the United States would be valid or legally good in itself, it is said—

4. That, at all events, the United States would take the property as a trust fund, subject to the total obligations to the stockholders, bondholders, and the other creditors of both companies.

So far as the stockholders, the bondholders, and the other creditors of the new company are concerned, the *stockholders*, as we have seen, would be bound by the action of their own proper representative, the general meeting; as for the bondholders (leaving out of consideration the bondholders of the Panama Railroad Company, who will doubtless have to be considered and perhaps paid from the railroad earnings, or otherwise, and the amount of whose bonds is given in the

last report of the Panama Railroad Company, hereto annexed) (Exhibit S), there are *no bondholders* of the new company; and, as for its *general creditors*, the company being a solvent and more or less flourishing concern, in view of the value of the railroad property, the indebtedness to them is said to be and must be small. It can be ascertained and paid by the company before the sale is consummated, or by an arrangement to apply to it a part of the purchase money.

As a general proposition it is not perceived how there could be any law or equity for subjecting a purchaser of an article sold as assets of a failing partnership (such as the *old* company) to the debts of the partnership. If that were the law there would be no purchasers of such assets, the creditors would receive no payment of their debts out of the proceeds, nor stockholders any dividend of a residue.

But it does not follow that the *property* has not become affected by definite liens diminishing its value to the extent of the liens—in other words, that the property itself, and no longer merely the new company or its vendee, has or will not become subjected to the equivalent of mortgages in favor of bondholders and creditors of the old company.

It was accordingly deemed wise to make a careful scrutiny into all possible defects of that kind, especially in view of the vast amount of the old indebtedness.

These liens might be of three or more kinds—voluntary or contractual hypothecations or mortgages of real property; judicial hypothecations as the result of judgments inscribed in the office of the keeper of hypothecations; and what may be called attachments or seizures by way of execution of personal property and seizures of realty for debt.

The fact that the property, so far as it is important, is in Colombia and not in France would not prevent the existence of such liens, even the judicial hypothecation, because it is doubtless true in Colombia, a Latin country, as it is in France, that foreign judgments, after receiving the sanction of the domestic courts, lead to the judicial hypothecation of real property.

It is here again that the special act of 1893 has been, perhaps, overcareful of private rights, or, at least, of pri-



vate remedies. The Civil Code (secs. 2114 et seq.) provides as follows:

“2114. Hypothecation is a real right attaching to immovable property bound for the discharge of an obligation; it is, in its nature, indivisible and subsists in entirety as to all the immovables bound, as to each one, and as to every portion of those immovables. It follows them into whose hands soever they may pass. (Code Civil, 1149, 1188, 1244, 1912, 2119, 2122, 2161, 2166, 2180, 2903, 2904.)

“2116. It is either legal, judicial, or by agreement.

“2117. The hypothecation called legal is that which results from the law. The judicial hypothecation is that which results from judgments or other judicial acts. Conventional hypothecation is that which results from conventions, from the forms of documents, and from contracts. (Code Civil, 2121, 2123, 2124.)

“2118. The following only are susceptible of hypothecation: (1) Immovable property used in business (*les biens immobiliers qui sont dans le commerce*) and their accessories, regarded as immovable; (2) the usufruct of the same property during the time it continues. (Code Civil, 525 et seq., 578, 2125.)

“2119. Movables, consequently, can not be hypothecated.

“2123. The judicial hypothecation results from judgments, whether in contested cases or by default, definitive or interlocutory, in favor of him who has obtained them. It results also from recognitions or verifications, made by judgments, of signatures placed to an obligatory undertaking unauthenticated (*sous seing privé*). It can be made use of as to the present immovable property of the debtor and as to that which he may acquire, except with the qualifications herein-after expressed. The decisions of arbitrators do not carry with them hypothecations, except as they may be supplemented by a judicial order of execution. The hypothecation likewise does not result from judgments rendered in foreign countries, *except as these may have been declared executory by a French tribunal*; without prejudice to any contrary dispositions which may exist in political laws or in treaties. (Code Civil, 307, 1350, 1351, 2114, 2124, 2148, 2160, 2168, 2428; Code Procedure, 147, 155, 193, 546.)

"2133. The hypothecation acquired extends to all the improvements made in the immovable property hypothecated."

Bressolles, in a commentary on the special law of 1893, published in 1894, under the title Liquidation of the Panama Company, referring to the judgment appointing the liquidator and declaring the association to be non-commercial (it seems the tribunal of commerce about the same time, a few days after that decision, in fact, decided otherwise, but the court of appeals reversed this; Exhibit 8), says, page 24:

"To hold the Panama Company a civil company was to declare it incapable of being declared bankrupt [*en faillite*]. Its insolvency and the suspension of payment which had followed put it simply in the condition of "*déconfiture*," but in 1889 the *déconfiture* of civil associations, no more than that of individuals, had in our legal system any regulation by law. Each of the creditors preserved in regard to the association the plentitude of his rights; he had the right of individual action, not only to obtain a condemnation against it, but to have himself paid in full the amount of his debt out of the company's assets, to the detriment of other creditors less active or less disposed to go to the expense of suing.

"It is in consequence of these principles that several bondholders of the Panama Company instituted proceedings immediately after the dissolution against the liquidator, to obtain payment of the coupons overdue and reimbursements of the principal of their bonds, relying for this latter purpose upon articles 1184 and 1188 of the Civil Code. To these pleadings the liquidator confined himself to asking a postponement in the discretion of the court, which was given him, but the plaintiffs gained their cases, and notably a condemnation of the company to a total reimbursement of the capital subscribed by them. (See especially judgment of the tribunal of the Seine, 25 June, 1890, *Droit* of July 4; judgment of 26 January, 1893, *Droit* of 29 January, confirmed by decree of 29 June, 1893, *Droit* of 1 July.) (See Exhibit 10.)

"The beneficiaries of these decisions promptly inscribed their judicial hypothecations [upon a building in Paris]. Certain of them even proceeded to execution. It is thus

that Messrs. Laurillard & Fleury, who obtained the judgment of 25th June, 1890, seized, after the expiration of the postponement in the discretion of the court [*delai de grâce*], a sum of 15,081 francs 50 centimes in the safe of the company. After fruitless resistance by way of a reference, the liquidator proceeded to contest the right of the plaintiff and demanded a decision affirming the nullity of the seizure as being made of goods legally unseizable, but he failed in his pretensions (judgment of the Civil Tribunal of the Seine, 9th February, 1892, *Droit* 10th February; confirmative decree of 19th July, 1892, *Droit* 20th July). (See Exhibit 10.)

"And the seizing creditors appropriated to themselves the sum seized in virtue of the rules of the ordinary law (*droit commun*)."

Besides the judicial hypothecations, there could be (as, in fact, there have been) pledges of the personal property [*nantissemens*]. The Civil Code (art. 2071 et seq.) defines the rules concerning these.

There is also the turning over of realty in order that the fruits may be obtained by the creditor (Code, 2085 et seq.); but the canal property, except the railroad, was not producing any revenue, and the railroad does not appear to have been, or to be now, in the hands of other than the railroad company. Besides, the interest of the canal company in the railroad is personal, not real—shares of stock.

The machinery, etc., in Panama was pledged by the liquidator to the contracting companies working on the Isthmus, and to some of these were pledged 30,500 shares of the railroad stock, but all these matters were settled in order to turn over to the new company the unincumbered railroad shares and machinery, etc., on the Isthmus.

The liquidator gives in his reports the details, dates, and circumstances of these transactions; and the personal property and plants, etc., at Panama, and the railroad shares, are not now affected by *nantissemens* entered into by the liquidator or old company.

The *nantissemens* or givings in pledge are by actual turning over of personal property and are not registered. The evidence of discharge is in the office of the liquidator, and the statements in his reports have been verified by examining the original documents there. (Exhibits 9, 10, 11, 12.)

But the question of hypothecations of the real property, say nothing of conventional hypothecations, remains to be discussed.

Strange as it may seem to us, no allusion is made in any of the reports to an ordinary mortgage of the large amount of land given by Colombia. As a source of revenue, to enable the company to construct the canal, such a mortgage would seem to us very natural, but I have found no reason to believe that it was resorted to. The record would be in Panama, but it is improbable that no allusion should be made to this in the numerous statements of assets, receipts, expenditures, etc., if such a mortgage had existed. The payment of interest would seem to necessitate such allusions.

This may be accounted for by the yet uncompleted condition of the actual transfer of lands by Colombia to the company and by the popularity of the enterprise and the ease with which, up to within a short time before the liquidation, it was possible to float bonds issued in pursuance of the by-laws of the old company, article 24, which, by the way, authorizes loans to be obtained on mortgage by the general meeting.

An examination has been made into the nature of the bond issues and copies procured of the bonds themselves. (Exhibit 13.) No allusion has been found on the bonds or in accounts of litigation or elsewhere, to any mortgage or hypothecation of the real property in Panama, except two unimportant judicial hypothecations or judgments which can be inscribed as hypothecations. (Exhibit 9.) The complete title to the lands, as I have said, has never really passed out of Colombia, the expense of getting that title put into final form having been one cause of the delay.

The reports of the liquidator up to two years ago (Exhibit 10) set forth the judgments out of which judicial hypothecations might have arisen, including judgments obtained in courts of Panama; whether all of them or not is a question which has not been overlooked. (See Exhibit 9.)

That law of 1893 merely suspended the rights of action of the individual creditors and turned these rights over to the mandataire to be exercised. If he did not or at any time does not exercise them by *using* them to oppose or affirm

something, the bondholders and general creditors could or can do so, upon first demanding that he should act, and giving him a month in which to make up his mind.

He and they can sue (and have sued) the liquidator. With their suits against third parties owing obligations to the old company we are not particularly concerned. But theoretically he or they could make use of the suspended proceedings, including any judicial hypothecations, against the liquidator and the property of the liquidation, while it continued to be the property of the liquidation.

A number of judgments were obtained against the liquidator before the act of July, 1893, by bondholders who sued to recover and obtained judgment for the total of their subscriptions, coupons unpaid up to December 14, 1888 (date of going into liquidation), and legal interest.

The number of suits is stated, and the names of the plaintiffs, in his third report (Exhibit 10). These names are Joreau, Roger, François, Donnadiou & Bougala, Debrys, Vaillant, Denovarre, Salleix-Laboige, Doumic. Eighteen other plaintiffs are mentioned in the same report as having made the same demand, but no judgments had been obtained by them when all these were suspended by the law of July, 1893.

In the nine suits in which judgment had been rendered, the plaintiffs are all stated to have proceeded in virtue of their judgments to garnishee or attach property in the hands of divers persons, and Mademoiselle Joreau had attached unissued lottery bonds in the hands of the liquidator.

From these nine judgments the liquidator appealed, but on the 29th of June, 1893 (two days before the special law was passed), the court of appeals affirmed the judgments (same report, Exhibit 10).

It is evident that between January 26, the date of the judgment below, and July 1, even if the appeal had not intervened to suspend previous proceedings in execution and make void those subsequent to the notice of appeal (Beauchet, sec. 1014), it is improbable that much was done in Panama in the way of registering judicial hypothecations. After that the mandataire (for the benefit of all the bondholders) could cause these judgments to be made executory by Panama judgments, supposing the Colombian

law to be identical with the French. They were judgments and final, since it is evident that the liquidator did not proceed to cassation to have them annulled.

As these nine judgments might possibly have been for an enormous amount, it was considered important to carefully examine them and their results.

The real property—at least that in which we are interested (there was some in Paris which, by suits in favor of some contractors, became affected with judicial hypothecations and was sold)—was and is not in France, but Colombia.

I append a certificate from the Register of Hypothecations of Panama stating that no hypothecations are of record there. (Exhibit 14.)

It is theoretically possible that, before the real estate ceased to be that of the old company, these plaintiffs or the mandataire took measures to establish judicial hypothecations under the law of Colombia, and that to the extent of the indebtedness to them, with interest, the real property there and all improvements that have been or may be made in it were mortgaged in this way. I am satisfied that such is not the case. (See Exhibits 9, 10, 11, 12, 14.)

As for judgments subsequent to the act of 1893, of a similar character, it is *possible* that the mandataire, prior to the date of the contribution to the new company, took a similar course, and also possible that creditors, upon his failure, did the same. But the reports of the liquidator indicate nothing of this kind, and the comparatively brief interval between the appointment of the mandataire, M. Lemarquis (July 4, 1893), and the date of the contribution (October 20, 1894) was occupied with other things. Among these were the successful proceedings by him and the liquidator against contractors who had obtained money of the company which it was alleged they were not entitled to keep, and the urgent business of bringing about the establishment of the new company, formed, not as it has been said, of the same personnel as the old company, but partly of contractors who had worked for the old company and were being sued as its *debtors* by its representative, the liquidator. With all these matters to be attended to, the mandataire does not seem to have had time, if he had thought it useful, to establish judicial hypothecations in Panama, either by

using the judgments of the nine plaintiffs above referred to or subsequent judgments based upon the like grounds of suit prior to October 21, 1894. (Same Exhibits.)

After that time it seems clear that nothing could be done with either the nine judgments or any later ones in Panama courts, for the simple reason that the liquidator and old company ceased to be the owners of the real property there.

There can not, of course, be created a judicial mortgage, or mortgage of any kind, as to property which does not belong to the mortgagor.

No system of law would tolerate that.

If there are judicial hypothecations arising from judgments obtained in France, all the judgments that could possibly give rise to them are in Paris, and practically all in the office of one tribunal. A careful inquiry into the matter develops the fact that the judgments referred to, even if they all led to judicial hypothecations, are for the insignificant total amount of about \$100,000 and interest. (Exhibit 9.) But I am satisfied that there are no such liens upon real property on the Isthmus, except upon two buildings, and as to these buildings the liquidator promises that the purchaser shall in some way be given a clear title. (Exhibit 9.)

The fact that the title to the land on the Isthmus has *never passed* from Colombia, and the absence of all allusion to a mortgage of them, makes it reasonably certain that they are not mortgaged.

The *possession* of the personal property in Panama by the new company, which does not seem to be doubtful, which possession must be turned over to the United States at the time of purchase, is inconsistent with *nantissements* or pledgings, which imply the loss of possession by the pledgor.

Two lines in the Colombian treaty to the effect that the United States and the property purchased can not be proceeded against in the courts of Colombia without the consent of the Government of the United States would put at rest all danger of litigation from those supposed persons who, having some technical or concealed right, which in fairness should be disclosed before the purchase, may possibly desire afterwards to bring unjust actions. Congress can at present control all suits against the Government in

the United States. In my opinion, however, the danger is purely imaginary.

V. The objection that the United States can not own the Panama Railroad Company because it is a State corporation does not seem to be very seriously relied upon. In the first place, the United States does not propose to become the corporation, but to purchase a large part of the stock already long owned by a canal company. That the Government can own stock in a private corporation has been frequently recognized by our courts. In fact, it is difficult to see why it can not own any kind of property it may have need of, whether individual or corporate. When it owns stock in a private corporation it puts itself on a level with the other stockholders and is bound like them by the charter. As this railroad is not in New York, but in a foreign country, it is not a highway of New York and so a public institution of New York. But it is suggested that our Government contemplates destroying the railroad and can not do that. But even conceding that it could not (which is not admitted, however), there seems to be no probability that the Government will ever dispense with the railroad. It will continue to need it so long as the canal will be operated. At all events, it is not so obvious that it will be destroyed that a good title can not be taken now because that means its destruction. It may be necessary, as it has been, to make it deviate somewhat from its present line; it may become less remunerative property; but all that is not material to the present question of getting a good title to some of the shares of stock. The French, and particularly the civil tribunal of the Seine, did not understand that the construction of the canal by the French company would interfere with the railroad, even as a paying concern. (Exhibit L.)

If the ownership of the stock entails any conditions as to the continued use of the railroad, these can be performed or gotten rid of with the consent of the State or minority stockholders interested. I am now discussing merely the legal possibility of the Government's acquiring and holding the stock; and I think that is clear.

VI. The objection that Congress has authorized a purchase only from the new company, not the liquidator of the old company, seems also to be unsound.



Our Supreme Court has frequently held that a law must have a reasonable interpretation in view of its object and not be rendered abortive, if that can be avoided.

Certainly, in view of the condition of the title as hereinbefore explained, the purchase will be from the new company, and the consent of the liquidator will be at most a waiver of rights as to property transferred to the new company.

But, if this were otherwise, it would be unreasonable to treat the act of Congress as forbidding a purchase from the new company in which it would be necessary for the old or the liquidator to join as vendor. This would be to defeat, not to ascertain, the will of Congress. What it wants is a good title from the *owner* of certain specified property, the owner being supposed to be, and being admittedly in part, the new company, and it is entirely justifiable to buy from the owner, although the ownership should be found not to be in the new company.

Whether we think it is in the new company or the old company seems to me, as no one pretends that it is out of both, altogether immaterial, since both join in the proposed sale.

The general meeting of the new company reserved the right to ratify the sale, and accordingly it will be necessary to have further action by it. Whether it should effect its transfer to the United States through one formality or another, and what should be done as to the two buildings on the Isthmus affected by judicial hypothecations, or as to the application of a small part of the purchase money to the payment of creditors of the new company—these and other details of conveyancing can be considered and disposed of at the proper time. They in no way affect the present question.

For the reasons I have given, I am of opinion that the United States would receive a good, valid, and unencumbered title.

Very respectfully,

P. C. KNOX.

The PRESIDENT.

LIST OF PAPERS ANNEXED.

	Page.
Exhibit 1. Objections that have been stated.....	194
2. Consultation of September 1, 1902, by Masters Limbourg, Du Buit, Devin, Thieblin, and Gontard....	195
3. Laws of 1867 and 1893 (France) concerning companies.....	221
4. Judgment of March 19, 1902 (civil tribunal of the Seine), approving liquidator's consent to sale.....	231
5. Judgment of July 3, 1902 (civil tribunal of the Seine), deciding against Donnadien, the bondholder, on tierce opposition .....	234
6. Argument before court of appeals of Paris in Donna-dieu case and decree of that court of August 5, 1902.	251
7. Judgment of July 3, 1902 (civil tribunal of the Seine), deciding against Sautereau and certificate of an attorney that he did not appeal within two months.	258
8. Judgment of March 8, 1889 (court of appeals of Paris), declaring the civil character of the old Panama Canal Company.....	262
9. Certificates of August 21-30, 1902, by the liquidator, concerning judicial and other mortgages, pledges of personal property, and liens in general.....	267
10. Extracts from reports of the liquidator, showing litigation in France and Colombia, pledges, settle-ments with contractors, etc.....	282
11. Judgment of July 26, 1894 (civil tribunal of the Seine), deciding against Mlle. Joreau.....	313
12. Evidence as to pledges of Panama Railroad shares ..	314
Includes:	
Certificate showing payment of dividends.	
Agreement of April 27, 1895.	
Agreement of March 24, 1900.	
Ratification of the agreement of March 24, 1900, by stockholders' meeting of the new company.	
Judgment approving the agreement of March 24, 1900.	
13. List and specimens of bonds.....	324
14. Certificate of August 21, 1902, by the register of doc-uments at Panama, stating no mortgages against the New Panama Canal Company.....	331

	Page.
Exhibit A. Extract from treatise on commercial law .....	331
B. Special act of July 1, 1893 (France), relative to the liquidation of the old Panama Canal Company ...	333
C. Concession of 1878 (Colombia) and extensions .....	337
D. Evidence of payments to Colombia since December 31, 1893 .....	354
E. By-laws of the old Panama Canal Company .....	355
F. Law of June 8, 1888 (France), authorizing the old Panama Canal Company to issue lottery bonds....	372
G. Judgment of December 15, 1888 (civil tribunal of the Seine), appointing provisional administrators of the old Panama Canal Company .....	373
H. Judgment of February 4, 1889 (civil tribunal of the Seine), dissolving the old Panama Canal Company, and appointing a liquidator.....	375
I. By-laws of the New Panama Canal Company .....	378
J. Minutes of the organization meetings of the New Panama Canal Company .....	393
K. Judgment of June 29, 1894 (civil tribunal of the Seine), approving contribution by the liquidator to the New Panama Canal Company .....	407
L. Judgment of August 8, 1894 (civil tribunal of the Seine), deciding against various tierce oppositions asking to have set aside the judgments of June 29, 1894, approving the contribution by the liquidator to the new company .....	414
M. Report of October 8, 1894, by commissaires appointed by the New Panama Canal Company to value the contributions made to it by the liquidator .....	429
N. First and last reports (1895, 1901) of the council of administration of the New Panama Canal Company.....	445
O. Judgment of August 2, 1901 (civil tribunal of the Seine), authorizing the liquidator to consent to arbitration .....	463
P. Resolution of December 23, 1901, of the council of administration of the New Panama Canal Company, to agree to arbitrate with the liquidator.....	466
Q. Agreement of December 24, 1901, regarding arbitration.....	466
R. Award of arbitrators, February 11, 1902 .....	468
S. Last report (1901) of the board of directors of the Panama Railroad Company.....	476
T. Official proposal of sale to the United States .....	501
U. Opinion of Maitre Dubint as to judgment creditors of the old Panama Company .....	504

Exhibit V. Opinion of M. Waldeck-Rousseau as to the objections to the title proposed to be given to the United States .....	Page. 506
---	--------------

## NOTE.

Besides the papers hereto appended, there were brought from Paris, among others, the following documents, which have been carefully examined, with a view to discovering any objections to the proposed title, but which it is deemed unnecessary to translate or print.

(a) Evidence of payments to Colombia up to December 31, 1893. (For subsequent payments, see Exhibit D above.)

(b) Document of August 19, 1876, constituting the International Inter-oceanic Canal Company (original company).

(c) Transfer of concession July 5, 1879, by the original company to the old Panama Canal Company (now in liquidation).

(d) Last reports (1887-88) of the council of administration of the old Panama Canal Company.

(e) Report of February 2, 1889, of the provisional administrators of the old Panama Canal Company.

(f) Judgment of February 13, 1890 (civil tribunal of the Seine), appointing M. Monchicourt coliquidator with M. Brunet.

(g) Judgment of March 8, 1890 (civil tribunal of the Seine), accepting resignation of M. Brunet, and continuing M. Monchicourt as sole liquidator.

(h) Judgment of July 21, 1893 (civil tribunal of the Seine), appointing M. Gautron coliquidator with M. Monchicourt.

(i) Judgment of July 1, 1893 (civil tribunal of the Seine), appointing M. Lemarquis mandataire of the bondholders.

(j) Judgment of February 18, 1889 (tribunal of commerce), holding that the old Panama Canal Company was of a commercial character.

(k) Certificate showing subscription of 60,000,000 francs of the capital stock of the New Panama Canal Company.

(l) Judgment of January 5, 1900 (civil tribunal of the Seine), appointing M. Navarre temporary administrator of the New Panama Canal Company, and evidence of his discharge December 27, 1900, and of the election of a new council of administration.

(m) Reports (1896-1900) of the council of administration of the New Panama Canal Company.

(n) Panama Railroad Company: Charter; by-laws; concession of 1867 from Colombia; list of directors and officers; certificate showing amount of capital; report of the board of directors (1900). (All in English.)

**EXHIBIT 1.****OBJECTIONS THAT HAVE BEEN STATED.**

1. That the obligation of the new company growing out of the contribution of the canal is such that the company not being bankrupt, but a going concern, claiming to be able to complete the canal, that company can not free itself from the obligation by selling the property. It must have been contemplated that the company would spend in the completion of the canal \$150,000,000 or more, and that the completed canal would pay large dividends and thus give the stock and bonds of the old company large value.

2. That under the principles of law recognized in America a corporation chartered to carry on a work of national interest can not transfer the whole of its property and rights to any one. The same principle is supposed to apply to French corporations chartered to carry on such affairs in France and the principle is supposed to extend to this canal, although not in France.

3. It is claimed that the lottery bond law requiring materials for the canal to be obtained in France, either shows that no sale to the United States could be made under the law of France or only a sale subject to that requirement.

4. That the new company is simply the old one reorganized and, therefore, upon principles of law recognized in America, has all the obligations of the old one and can not give any title free from those obligations, especially to the purchaser of the whole of its property and rights.

5. That the French court has no jurisdiction to authorize a solvent company to sell all of its property in violation of the existing agreement to construct the canal, and the liquidator can not enter into a contract by which the whole nature of the original contract of contribution is changed, and the French court has no jurisdiction to authorize him to do so.

6. If the United States should purchase the property of the new company charged as it is with a trust, being the old company reorganized, suit could be brought in the United States by the cestuis que trust, and under "*Thomas v. R. R.*," 101 U. S., etc., the sale would be treated as void because ultra vires, and the property taken to satisfy the trust. (*Central Transportation Company v. Pullman Palace Car Company*, 139 U. S., 24; *Railroad v. Hooper*, 160 U. S., 514.)

7. The Panama Railroad Company being a New York corporation the Government of the United States can not become its owner for similar reasons.

8. The new company can not sell without the consent of the French Government, the enterprise being national. This national character is shown by the declarations of Colombia in its concession that the canal and railroad are of public utility, and the following in article 18 of the canal concession, "As this enterprise is essentially international for pub-

lic utility, it is understood that it shall be always kept free from political influences."

9. "In taking over a corporation, if such a thing can be done, we take over the property subject to all encumbrances and become bound to execute all its agreements."

10. The contract of the liquidation for the stockholders and bondholders of the old company with the new company to pay for their benefit 60 per cent of the net profits of operating the canal, fixed in them a vested right to these net profits that no court and no legislature could violate. (*Bedford v. Building and Loan Association*, 181 U. S., 227.)

11. In *Railroad v. Chicago Railroad Company* (163 U. S., 581), the Supreme Court say: "Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto, and they can not, except with the consent of the State, disable themselves from the discharge of the functions, duties, and obligations which they have assumed" (citing *Thomas v. Railroad Company*, 101 U. S., 71).

12. An honest debt is never extinguished until it is paid, and we can not place our feet in the shoes of the Panama Canal Company and take over this property without first being satisfied that this debt is paid, or that it has been released by the bondholders and stockholders of that company.

13. Further, it is feared in a general way that the property in the hands of a purchaser will be liable, or the purchaser will be liable, to indefinite claims, liens, and demands of bondholders, stockholders, and creditors of both companies.

14. It said that the law of Congress authorizes a purchase from the new company and that the property has become again, owing to the recent agreements between the liquidation and the new company, the property of the old company or liquidator.

---

#### EXHIBIT 2.

#### CONSULTATION OF SEPTEMBER 1, 1902, BY MASTERS LIMBOURG, DU BUIT, DEVIN, THIEBLIN, AND GONTARD.

The undersigned, advocates of the court of appeals of Paris, being consulted, in view of divers objections made in America to the project of cession of the Panama Canal by the new company to the Government of the United States, upon the following questions:

1. Has the new company a certain and absolute title of ownership to the concessions, the works of the canal, and all the other properties which it is proposed to sell and transfer to the United States?

2. Has it the power to make that sale and transfer?

3. Is it, from any point of view, a reorganization of the old company?

4. Are the properties which it has acquired from the old company

burdened, since the contribution, with the debts and charges of the old company; is it, in any manner whatever, bound by those debts and charges?

5. Is the old or the new company a national company, with the consequence that this national character restrains or diminishes the right of ownership, of administration, and the power of sale of the properties of the company?

6. Have the recent agreements between the new company and the liquidator (December 24, 1901) and the judicial proceedings affecting them, by which the liquidator has compromised with the new company as to the contractual obligations contracted by the latter toward the former in the terms of the original contribution contract, invalidated, or changed in any way whatever, the title of the new company acquired by the original contribution, and had the liquidator the capacity to conclude that agreement of the 24th of December, 1901?

7. Does the law of June 8, 1888, extend to the new company and bind it? Will that law extend to its vendee and bind it?

8. Does there exist in France a jurisdiction having competence to revise the acts of the legislative power; especially can the law of July 1, 1893, be declared void by any jurisdiction whatever?

Considering the questions submitted, together with all questions of law that can arise from the project of cession, involved in a study of the following three points:

1. Constitution, nature, and legal existence of the New Panama Canal Company.

2. Existence and extent of its right of ownership over the properties which it is proposed to cede.

3. Existence and extent of its right of disposition as to those properties;

It being proper, without regard to the order of the questions submitted, to proceed to a methodical and complete study of those three points, and afterwards briefly to discuss the statements made in the course of that study, and the conclusions to be drawn from them which respond to the questions submitted, give the following opinion:

#### CHAPTER I.

##### CONSTITUTION, NATURE, AND LEGAL EXISTENCE OF THE NEW PANAMA CANAL COMPANY.

The New Panama Canal Company was constituted definitively on October 20, 1894.

By the terms of its by-laws, filed with Messrs. Lefebvre and Champetier de Ribes, notaries at Paris, the 26th of June, 1894, it is an anonymous commercial company governed by the laws of the 24th of July, 1867, and 1st of August, 1893 (Article 1 of the by-laws).

In France anonymous commercial companies formerly required an authorization by the Government under article 37 of the Code of Commerce.

But this article was abrogated by the law of the 24th of July, 1867 (article 47), and article 21 of the same law provides that "in future anonymous companies can be formed without the authorization of the Government."

Since then anonymous companies have been constituted freely in France, without any intervention of the public authorities, by means of the mere agreement of parties and the fulfillment of legal formalities, namely,

The by-laws of the company which form the compact are first established thereby or by the founders of the company.

Then if a stock company is in question, there is an emission of shares of stock representing the capital; the company can not be constituted until after the subscription of the total capital and the payment by each stockholder of the fourth at least of the shares by him subscribed (Articles 1 and 24, law of July 24, 1867).

This subscription and these payments are shown in a declaration made by the founders of the company in a notarial document (Articles 1 and 24, law of July 24, 1867).

A meeting, called the first general constitutive meeting, to which are called all the shareholders, is convoked to establish the subscription and the payment of one-fourth and to name commissaires charged to make a report upon the contributions which do not consist of money. (Articles 1 and 24, law of July 24, 1867.)

A second meeting, called the second general constitutive meeting, is afterwards convoked to hear and approve the report of the commissaires charged with verifying the contributions and to name the first administrators. (Article 25, law of July 24, 1867.)

The company is at this moment definitively constituted; no more remains but to fulfill the formalities of publication required by article 35 of the law of July 24, 1867, namely:

Deposit in the clerks' offices of the tribunal of commerce and of the justice of peace of the place in which the company is established of a copy of the constitutive document, to which are annexed a copy of the notarial document showing the subscription and payment of one-fourth, a copy of the minutes of the deliberations of the general constitutive meetings, a list of the names of all the stockholders of the company.

Finally, a copy of the constitutive document and of the papers annexed is published in the newspapers designated to receive legal announcements. (Article 56, law of July 24, 1867.)

These different formalities are to be fulfilled within a month of the constitution of the company.

The French Government remains a complete stranger to the formation of companies. It is thus that the New Panama Canal Company has been freely constituted, without the Government's intervening in any way in its formation. It has not been the subject of any special law, and it has not had the benefit of any favor or any patronage of the state.

This abstention does not appear only from the condition of the legislation. It is put in relief by certain significant documents and under solemn circumstances which it is not without interest to mention.



Already in 1880, a short time before the constitution of the Universal Company of the Inter-oceanic Canal, the French Government, by a letter of its diplomatic representative in the United States, dated March 22, officially declared to the Secretary of State of the United States "that it was not in any manner interested in the enterprise and that it did not propose to intervene in it or give it any support either directly or indirectly." (See opinion, Sullivan and Cromwell.)

Later, the Government anew exhibited in a manner more clear, at the time the law of July 1, 1893, concerning the liquidation of the Universal Company of the Inter-oceanic Canal was under discussion, that it intended to remain a total stranger, in the future as in the past, to the enterprise of the Panama Canal, an enterprise which it considered as one of pure and simple private concern.

Thus, in the session of March 4, 1893, of the Chamber of Deputies, M. Deloncle having proposed an amendment to article 10, M. Bourgeois, keeper of the seals, minister of justice, opposed that amendment as indicating a line of conduct to the liquidator, saying: "The Government and the public authorities have declared that they do not wish to take any responsibility in this matter" (that of Panama), and adding, with the assent of the Chamber, "If the amendment of M. Deloncle is adopted, we depart from the attitude which the Government has continually followed up to the present." (Good! good!) (Official Journal of March 5, 1893, p. 846.)

Thus, again, in the same session, M. Viette, minister of public works, opposing a motion presented by M. Moreau, looking toward the formation of a commission of verification by the ministry of public works, said, with the same assent:

"I shall not constitute a commission in the name of the Government, because the Government should remain a total stranger to the Panama matter" (Good! good!). (Official Journal of March 5, 1893, p. 847.)

There is, then, but an examination to be made to learn whether the new company, at the time of its formation, conformed to all the provisions and formalities required, and whether, consequently, it was regularly constituted.

The legal conditions set forth above have been fulfilled, as follows:

1. The by-laws of the company were drawn up in a notarial document in the presence of Masters Lefebvre and Champetier de Ribes, notaries at Paris, the 26th of June, 1894.

2. A public subscription of 600,000 shares, forming the money capital of the company (the 50,000 others being set apart to the Government of Colombia), was opened on the 22d of September, 1894, and completely subscribed. The fourth part of this subscription was paid in by each shareholder.

3. The declaration of the subscription of the capital and payment of one-fourth was received by Masters Lefebvre and Champetier de Ribes, notaries at Paris, on June 29, 1894.

4. The first constitutive meeting, held October 4, 1894, recognized the genuineness of that declaration and selected commissaires charged to appraise the contributions made by M. Gautron.

5. The second general constitutive meeting, held October 20, approved the report presented by the commissaires and appointed the first administrators.

At that moment the company was definitively constituted.

Finally, to make sure that the formalities of legal publication were carried out, it suffices to refer to the journal of legal announcements, "*Les Petites Affiches*," No. 730, October, 1894.

Thus is established in a manner beyond doubt both the commercial character (altogether private) of the New Panama Canal Company and the regularity of its constitution of date October, 1894.

Since that date its existence has continued without any interruption or change, and the company is at present in possession of all its powers and juridical rights.

The incident of the appointment of M. Navarre as provisional administrator in 1900, which may be misunderstood in the United States, merits an explanation of its true character and its lack of all importance.

In February, 1900, the members of the council of administration, disagreeing in opinion, resigned in a body, and, not to leave the company without regular representation and direction, asked the tribunal of commerce to appoint a provisional administrator charged with convoking the general meeting of stockholders to elect a new council.

It was on this initiative that M. Navarre was appointed, and not on the intervention of creditors or stockholders, nor by the spontaneous action of the judicial authority. This appointment did not imply, then, in any way, the suspension of the life of the company. (See judgment of February 5, 1900.)

M. Navarre made haste, conformably with his purely provisional and tentative commission, to convoke the general meeting in order that it might elect a new council.

And this council having been elected, he made report to it of his administration, and his commission was at an end, and this incident, wholly within the company, which had given occasion to his appointment, was closed.

The proceeding taken in that matter is of frequent use. It is taken whenever a council of administration considers it its duty to retire spontaneously in the course of company transactions.

## CHAPTER II.

### EXISTENCE AND EXTENT OF THE RIGHT OF OWNERSHIP OF THE NEW COMPANY AND THE PROPERTIES WHICH ARE TO BE THE SUBJECT OF THE CONCESSION.

The right of ownership of the New Panama Canal Company as to the concession of the interoceanic canal and the other properties which it is proposed to cede to the Government of the United States is no less clear than its own existence.

This right results from the contribution made to it by the liquidator

of the Universal Company of the Inter-oceanic Canal when the new company was constituted.

We have to dwell upon this contribution for the reason that the greater part of the objections we are to examine are derived from a misconception of its regularity, its character, its extent, and its effects.

This contribution, which is no other than a sale, was made by M. Gautron, liquidator of the Universal Company of the Inter-oceanic Canal, to the New Panama Canal Company, in the following terms. (Article 5 of the by-laws.)

\*            \*            \*            \*            \*            \*

Three questions can be stated apropos of the contribution thus made:

1. Had the liquidator the power to make it?
2. Has it been regularly made?
3. What are its effects?

1. Question. Had M. Gautron, liquidator of the Universal Company of the Inter-oceanic Canal of Panama, the right to make to the New Panama Canal Company the contribution of the greater part of the assets of the Universal Company?

To clearly decide this question it will suffice to state with precision the facts and applicable principles.

The dissolution of every company leads necessarily to the settlement of its affairs. It is this settlement, preliminary to a distribution, intended to prepare for one and to lead to one, by assuring the realization of the company assets, which essentially constitutes liquidation.

During this settlement the social being continues to exist. It survives for the requirements of liquidation. (Paul Pont, *Traité des Sociétés*, No. 1930 et seq.; Vavasseur, *Traité des Sociétés*, No. 246; Houpin, *Traité des Sociétés*, No. 203; Cassation, May 29, 1865; Sirey, 1865, 1, 325. See also Cassation, July 27, 1863, Sirey, 63, 1, 457; February 3, 1868, Dalloz, 1868, 1, 225; December 22, 1868, Dalloz, 69, 1, 156; March 23, 1870, Dalloz, 70, 1, 1415; March 6, 1872, Dalloz, 72, 1, 169; February 8, 1875, Dalloz, 75, 1, 308; May 17, 1877, Sirey, 77, 1, 356; August 16, 1880, Dalloz, 82, 1, 80; December 18, 1883, Sirey, 1886, 1, 27; March 11, 1894, Dalloz, 84, 1, 199; December 2, 1885, Sirey, 88, 1, 331; January 13, 1892, Sirey, 92, 1, 100; May 24, 1892, Sirey, 92, 1, 469.)

These are assured principles.

But who is to make this settlement? Who will represent the social body while it is going on?

Who, in other words, will be the liquidator? The French legislator has not established rules to govern the conditions of liquidation; "he has referred to the condition of liquidation in several texts." (Code of Commerce, article 64; law of 1867, article 67.) He has not regulated it or even defined it in any. Consequently, in default of legislative provisions, it is from practice, general principles, decisions of the courts, that we must ask the solution of the numerous difficulties to which the business of liquidation gives rise. (Pont, No. 1934.)

"Being a mandataire (agent) of the company, which he represents in the interest of the members, the liquidator ought, in principle, to be appointed by them." (Pont, No. 1937.)

No difficulty arises if the original company agreement designates or permits to be designated the liquidator, or if the members are in accord in choosing one.

But if they are too numerous to act themselves and do not get into accord, there is litigation, and then it is necessarily requisite to apply to public justice—to the tribunals—the civil tribunal if a civil company is in question, the commercial tribunal if a commercial company is in question. (See Pont, No. 1942; Houpin, No. 205, and authorities and decrees cited.)

The tribunal thus acquiring possession of the matter becomes substituted for the members; it acts in the plenitude of their rights; it can then confer upon the liquidator all the rights that the circumstances seem to require him to have and the original company agreement permits.

Besides, although appointed by a court, the liquidator is none the less the representative of the company in the interest of the associates, responsible with regard to them for the execution of his commission and free to act, under that responsibility, within the limits of his powers, with the right, upon occasion, to ask to have those enlarged by the tribunal from whom he obtains them.

As for the powers of the liquidator, it can be laid down as a general proposition that, in the absence of special provisions or express reservations, they extend to all acts, to all operations that may be necessary for the settlement of the affairs of the company. (See Paul Pont, *Traité des Sociétés*, Nos. 1934, 1952, et seq.) The measure of those powers is obtained from the object he is charged to accomplish.

Consequently he has not merely the power of conducting the business of the company. He has and should have the power of disposal, for that power is necessary to reach a realization of the assets and a payment of the debts, which it is his business to accomplish. He can alienate, and alienate even the immovable property of the company, at least where there is no prohibition against that in the by-laws or in the terms of his appointment. (See Pont, No. 1957; Houpin, No. 208; *Cas.*, July 24, 1871; *Sirey*, 1871, 1, 47.)

Judicial decisions recognize, moreover, his power to realize the company assets by means of a contribution en bloc to a new company. (See *Cas.*, May 12, 1896; *Off. Houillères des Rives de Gier et Houillères de St. Chamand. Revue des Sociétés*, 1896, 1, 356.)

These principles having been established, let us turn to the facts:

The Universal Company of the Interoceanic Canal was constituted on the 3d of March, 1881, under the anonymous form, with a capital of 300,000,000, according to the by-laws received by Masters Champetier de Ribes and Mavot de la Querantonais, notaries at Paris, the 20th of October, 1880.

On the 14th of December, 1888, it suspended payment and asked the tribunal to appoint provisional administrators.

Appointed, these administrators called the stockholders to an extraordinary general meeting for the 26th of January, 1899, in order to take such measures as the situation of the company required; that is to say,

to declare its dissolution and arrange for its liquidation. To make sure of the quorum necessary to the valid constitution of that meeting, that is to say, the one-half of the capital, making use of the power given them by article 69 of the by-laws, the provisional administrators called to the meeting the owner of even a single share and gave to their call all desirable publicity. (See first report of Monchicourt, pp. 27 to 30.)

Notwithstanding these efforts, the extraordinary general meeting could not be regularly constituted, the half of the capital not being found represented.

However, the meeting, such as it was, manifested its wishes by adopting the following resolution:

"Third. The meeting, while it can not deliberate, announces the desire that the Universal Company of the Interoceanic Canal of Panama may be dissolved, that a liquidator may be appointed, with the most extensive powers to make any contract, cede part or the whole of the present company's assets, by way of contribution or otherwise, to a new company, for the best interests of the company, and that M. Brunet may be chosen as liquidator, with the power to ask in the proper place for the addition of one or more other liquidators."

It was in these circumstances that, the meeting of stockholders not being able to constitute itself, the Universal Company being consequently unable to act itself and to take the measures which the situation demanded, that is to say, to dissolve itself and put itself in the condition of liquidation, certain of the stockholders asked the civil tribunal of the Seine, conformably to article 37 of the law of July 24, 1867, to pronounce the dissolution and the placing in liquidation of the Universal Company and the appointment of a liquidator for it.

In this state of affairs, by a judgment of February 4, 1889, the tribunal pronounced the dissolution and the placing in liquidation of the company, and named M. Brunet liquidator, "with the most extensive powers, especially to cede or contribute to a new company the whole or part of the company assets, to make or ratify with the contractors for making the Panama Canal any agreement having in view the continuation of the work, and, with this end, to issue any bonds and make any pledges of personal property."

This judgment was, in substance, but the carrying out, in spirit and almost in language, of the resolution which the meeting of January 26, powerless to validly deliberate, had passed under the form of an expression of desire.

Thus the powers given to the liquidator, Brunet, clearly carry the general right to alienate the company assets, and especially the right to alienate them by way of contribution to a new company.

Then we knew how these powers were transmitted to M. Gautron.

We know, that is, how M. Monchicourt was named on March 8, 1890, as liquidator in place of M. Brunet, who had resigned; how M. Gautron was joined with M. Monchicourt as coliquidator on July 21, 1893; how, finally, M. Gautron has remained since that date sole liquidator of the Universal Company—always with the powers conferred by the judgment of February 4, 1889.

Undoubtedly this careful explanation suffices to set at rest all doubt of the power and the rights of Liquidator Gautron.

But this is not all.

This power of the liquidator, this right to cede, has been sanctioned by the highest power we recognize in France, the legislative authority.

And this brings us to speak of the law of July 1, 1893, concerning the liquidation of the Universal Company of the Interoceanic Canal of Panama.

That law, passed by the Chamber of Deputies at its sessions of the 2d and 4th of March, 1893, adopted with amendments by the Senate on May 29, 1893, returned to the Chamber and passed by it as it came from the Senate on the 29th of June, 1893, was completed by its promulgation on July 2, 1893, conformably to the provisions of the decree of 5th and 11th of November, 1870, concerning the promulgation of laws and decrees. (Article 1, Civil Code.)

Its authority binds all; no one can contest its legality; our constitution does not contain a power analogous to that of the high court of the United States. Only the legislative power can with us revise a law regularly passed and proclaimed.

We know under what circumstances that law of July 1, 1893, was passed.

The Universal Company of the Interoceanic Canal of Panama has assumed the anonymous commercial form, but it was a civil company by reason of its object, and its form could not put out of sight that character, as our legislation stood prior to August 1, 1893. It was only at this last date that a new law decided that the anonymous commercial form carried with it the commercial character of even companies civil by their objects.

The civil tribunal of the Seine was right in recognizing that civil character in its judgment of February 4, 1889, naming M. Brunet as liquidator.

And the court of appeals of Paris, getting possession of an appeal, not from the decision of the civil tribunal, but from a judgment of the commercial tribunal of the Seine of February 18, 1889, denying that character, recognized and formally declared, in its turn, by decree of March 8, 1889, that the Universal Company of the Interoceanic Canal of Panama constituted a civil company. (Paris, 1 ch., March 8, 1889, *Receuil de Sirey*, 1889, 2, 225.)

The rules concerning the liquidation of commercial companies differ from those applicable to civil companies. They render the former liquidation more easy and rapid by simplifying the operations, and are, from that fact, more favorable to the interests involved. The state of the law did not in 1893 permit the liquidation of the Panama Company, a civil company, to have the benefit of these rules, and the great value of the enterprise, the enormous number of the shareholders, bondholders, and creditors, caused this legal impossibility to be regretted. This gave rise to special measures for an exceptional situation, and a special law arranged, upon fixed lines, the liquidation of the Panama Company.

This law, asked for by the liquidator, M. Monchicourt, from 1892, the subject of bills introduced by individual members (those of Ramel and Roger de l'Aube), submitted finally by the Executive to the Chamber of Deputies on the 20th of February, 1893, and adopted by the Chamber and Senate, with some modifications, is the law of July 1, 1893.

After having, by a happy borrowing from the law of bankruptcy, suspended by its first article all suits begun by bondholders and other creditors of the Universal Company, whether against the liquidator as such, against the administrators to enforce their responsibility, for restitution against outside parties, or any other kind, as well as the proceedings for preservation or execution against the properties of the company, this law treats, under two different heads, of—

1. The liquidator.
2. The mandataire of the bondholders.

The title treating of the liquidator regulates for the best interest of all the two important operations belonging to him—realization of assets and distribution—placing the former under the authority and control of the civil tribunal of the Seine.

It is thus worded:

“Article 10. Every act of realizing assets, every contract carrying a cession or contribution of the whole or part of the company assets performed by the liquidator of the Universal Company of the Interoceanic Canal of Panama, shall be submitted to the approval of the civil tribunal of the Seine, which shall decide in public session, after a report by one of the judges.

“Article 11. Every judgment of approval rendered in pursuance of the preceding article shall be published within ten days in the Official Journal and the Official Journal (Commune edition).

“It may be attacked by tierce opposition within not to exceed one month after the publication, by the stockholders, by the mandataire of the bondholders, and by the other creditors of the company. The tribunal shall decide summarily within a month. The appeal must be interposed within ten days from the notification of the judgment to the party personally or at his domicile.”

Is it not evident that in providing for and submitting to the approval of the tribunal by these articles “contracts carrying a cession or contribution of the whole or part of the company assets, made by the liquidator of the Universal Company of the Interoceanic Canal,” the legislator has recognized and in some sort consecrated, although that was not necessary, the power and right acquired by the liquidator under the general rules of law, expressly referred to in the decisions of the courts investing him with his functions, to alienate the company assets by way of contribution to a new company?

Thus, principles, the act of appointment, finally the special law, affirm the power and the right of M. Gautron, and legitimize his intervention in the constitutive agreement of the New Panama Canal Company, for the purpose of contributing to that company part of the company assets of the Universal Company.

M. Gautron had, then, the power to make the contribution which he did make.

In the title treating of the mandataire of the bondholders, the act of July 1, 1893, provides for the protection of the most interested creditors of the Universal Company, the bondholders, during the course of the liquidation of the said company.

On one hand, it gives to the mandataire alone the rights of action belonging to the bondholders, and it accords to this mandataire, for that purpose, the benefit of judicial assistance.

On the other hand, it leaves to all and to each of the bondholders the right to intervene in the proceedings instituted by the mandataire and to institute all proceedings, in case the mandataire, having been notified to proceed and given time for that purpose, neglects or refuses to do so.

Finally, it recognizes in the mandataire alone the right to proceed to execution in case of judgments in favor of the bondholders, even when they have acted upon his default, and individually obtained judgments. But it provides at the same time that the mandataire shall pay over to the liquidation all sums he may receive, and leaves the bondholders, taken singly, the right to produce their claims before the liquidator and receive directly all dividends which may be coming to them.

Thus all dangers are provided against, it should be noted, without the bondholders, to whom the most effective aid and protection are afforded, being deprived of any advantage; they are merely prevented from establishing, contrary to the natural law of equality, and we may say, contrary to the most elementary equity, a situation of individual preference to that of the mass of bondholders, by executing for the exclusive benefit of some, judgments which they may obtain and by which all ought to profit.

It may be drawn from this part of the law of July 1, 1893, that all alienations consented to by the liquidator, with the approval of the tribunal, are definitive and can be set up against all creditors, persons in privity and stockholders of the Universal Company. All rights of these different kinds of persons as to the assets of the Universal Company are irrevocably concluded by such an alienation. Their rights no longer exist except as against the liquidator and only as to the products of the liquidation.

#### SECOND QUESTION.

##### REGULARITY OF CONSTITUTION.

M. Gautron, having power to make the contribution, as we have demonstrated, it only remains to see if he has done so in conformity with the formalities prescribed by the law of 1893.

Has the liquidator asked and obtained the approval required by that law; is the judgment of approval definitive?

This approval was given by the civil tribunal of the Seine by judgment of June 29, 1894, copied by Messrs. Sullivan & Cromwell as an exhibit to their brief, pages 165 et seq.

The judgment of approval was published pursuant to article 11 of the



law in the Official Journal, and Official Journal (Commune edition) in the issues of July 1, 1894.

The judgment was attacked by divers tierce-oppositions pursuant to the text of said article 11.

The civil tribunal of the Seine, deciding upon these tierce-oppositions, declared them without just foundation by a judgment of August 8, 1894, upholding in all its terms and provisions the judgment of June 29, 1894.

Finally, no appeal having been taken from the judgment of August 8, 1894, within the time allowed by article 11, that judgment has passed into *res adjudicata*, and the approval given by the judgment of June 29, 1894, has become definitive.

No one in France would be permitted to contest it.

### THIRD QUESTION.

#### EFFECTS OF THE CONTRIBUTION.

What are the effects of the contribution thus made?

In principle the contribution to a company of a certain and determined property or collection of properties carries an alienation, a transfer of ownership, to the benefit of the company.

This transfer operates *inter partes*, according to general principles of law, the obligation to contribute being an obligation to give by the very force and effect of the agreement.

That is, the contribution is in all respects similar to a sale (Article 1845 of the Civil Code). Let us say, briefly, the contribution is a sale. It is a sale in which the price may consist either in a fixed sum or in a stipulation for part of the profits of carrying out the company's project.

A contribution can be pure and simple. It can also be subjected to conditions upon which it will be suspended or undone.

Briefly, here, as in the case of a sale, there is full and complete liberty.

The agreements are the law of the parties.

This is the principle formulated in Article 1134 of the Civil Code, an essential principle of our law, giving rise to numerous consequences and applications, and never to be lost sight of in the present examination.

This being stated, if we look at the agreements which have been made we find:

That the parties have stipulated "that the New Panama Canal Company shall be the owner of the properties and rights ceded and contributed from the day of its definitive constitution," with a single reservation concerning the rights as to the Panama Railroad;

That the contribution of these latter rights, thus differing from that of the other rights and properties, was made under a condition upon which they were to return, the said rights to become fully vested in the new company upon the completion of the canal or the payment of the sum of Fr. 20,000,000, otherwise to return to the liquidation.

We have seen that the New Panama Canal Company was definitely constituted on the 20th of October, 1894.

We hence conclude, with absolute assurance:

That from that date it became the owner of the properties contributed, the definitive and unchangeable owner of all the properties other than the rights in the Panama Railroad, owner under the condition of finishing the canal or paying the Fr. 20,000,000 of the rights in the Panama Railroad, this being the simple application of article 1583 of the civil code, according to which the ownership of the sold object is transferred to the vendee as soon as the two parties have reached an agreement as to the matter and the price, "although the price has not been paid;"

That from the same date the Universal Company of the Inter-oceanic Canal of Panama, represented by its liquidator, has ceased to be the owner of the properties contributed, except as to the condition concerning the Panama Railroad, and that the ownership of the properties contributed has been definitely replaced in its assets by the price of them—that is to say, by a right to a part of the profits which was given in return for its contribution.

It can not be argued that this participation in the profits implies any retention whatever of ownership by the liquidator.

The liquidator, contributor of the properties whose cession is proposed, is completely deprived of his rights in the properties in favor of the new company. According to French law, he who should consent to that contribution in consideration of getting a certain number of paid-up shares, giving him rights equal to those of other shareholders, would not less lose entirely the ownership of the properties contributed, this ownership resting exclusively in the social being, the new company; the concurrence of such contributor in a subsequent sale of a part of the assets of that company is a thing unknown to French law, and we are convinced that it is the same in every system of law. The contributor has, in that case, only the rights belonging to every stockholder, as long as he keeps possession of his shares, but all personal right as contributor and former owner is definitely annihilated as to him.

For much stronger reasons is this the case for a contributor who in exchange for his contribution does not become a holder of shares or parts of the company assets, and contents himself with a participation in the profits resulting from his contribution. Such a contributor becomes interested in the results; he does not possess a part of the ownership of the company funds, and his right is resolved into an obligation to him of the company, of which he is not even a member.

The ownership resides, then, exclusively in the person of the company, distinct from that of the associates; neither they, nor, for a stronger reason, one who is simply interested in the results, as is the liquidator, possesses any particle of that ownership.

Nor can any argument be drawn, either, according to the same line of thought, from the power stipulated in favor of the liquidator, during the making of the canal, to have a commission of his own charged to inspect the progress of the works, the condition and care of the materiel and

immovable property, as well as the accounts concerning these matters (article 5 of the by-laws), for this arrangement is explained by the inability in which the legislator would otherwise find himself, by reason of the very nature of his rights, to exercise, during the period of construction, an inspection which the value of the obligation owing to him nevertheless makes legitimate, and which would not be sufficiently obtained during that period from a mere examination of balances and writings. This power in no way negatives the idea of a definitive alienation; on the contrary, the circumstance that it became the object of a special stipulation corroborates the fact of a complete alienation of the ownership. If a single particle of ownership remained in the liquidator, he could, as co-owner, inspect without any stipulation.

Thus the contribution undoubtedly substitutes the New Panama Canal Company in all the rights of ownership of the Universal Company of the Inter-oceanic Canal of Panama.

Is it by a counterstroke, substituted in the whole or a part of the obligations and personal charges contracted or assumed by the latter on account of the properties ceded?

No, beyond a doubt.

As a general rule, the personal obligations of a debtor burden only his representatives properly so called, his representatives by law or convention, such as the heir, the universal legatee, the vendee *en bloc* of his situation with regard to assets and debts. He who becomes the vendee of a particular object is subjected only to the real charges, inherent in the said object, stipulated in the contract and inseparable from its possession.

A simple acquirer of properties, specified individually and by name, the New Panama Canal Company can not be held bound except for the payment of the price agreed upon; the personal obligations of its vendor do not concern it.

To represent the new company as continuing the person of the Universal Company, whether we consider the new company as a reorganization of the Universal Company or we regard it as the acquirer of the totality of the goods of the old company, would be to fall into a manifest error as a matter of fact. This can be easily understood.

1. Nothing less resembles the reorganization of the Universal Company than the formation of the new company, entirely distinct from the preceding. In reality, French law and practice are unacquainted with what in England and the United States is called reorganization.

Out of two things, one; either the old company exists alone and complete, or a company entirely new has been constituted. In the first place, we frequently see that the old capital is reduced in a greater or less amount and a new capital is called in by subscription, but in this case the company continues to exist as a moral person; nothing is changed in its existence; its debts continue to burden it as in the past; the creditors do not change their character, and at least if they have not consented to a remission of the debts, their rights undergo and can undergo no modification.

In the present case it is useless to insist upon showing that the Universal Company has not been reorganized; on the contrary, it has been dissolved by judgments which have passed into the force of *res adjudicata*. It has then ceased to live except for the requirements of liquidation, ordained by the same judgment; it is then true (to make use of an expression, which this time is just) that no power in the world can give back an active existence to the Universal Company. Its liquidator has received a commission to realize its assets and pay its debts by means of the product of realization and to the extent that that product will permit. He could not then, not having any authority for that, reorganize the Universal Company, a thing he could not do without the concurrence of the old stockholders and the subscribers to the new capital. Nothing of the kind has taken place. It can then be affirmed that the new company is not a reorganization of the old company, and that consequently the new company does not find itself *ipso facto* burdened with the debts and engagements of the Universal Company.

2. It is no more correct to say that the new company is the successor by universal title of the Universal Company because it has taken all the assets and by that very fact has become bound for all its engagements.

As a matter of fact, it may be remarked that an important part of the assets of the Universal Company—the lottery bonds—have not been transferred to the new company. This circumstance alone puts an end to the objection.

But it is proper to go further, for even admitting that the liquidator of the Universal Company has transferred to the new company the totality of the goods of the former, it would not result that the other company is a universal successor bound for the debts, obligations, and charges of the former company.

It is not to be forgotten that the Universal Company was not solvent; that it was, on the contrary, in judicial liquidation after having suspended its payments; that a special law was necessary to withdraw this liquidation from the pursuits of unpaid creditors and from the forced sale of its properties. If it is an indisputable principle that he who takes the whole assets of a debtor and substitutes himself for that debtor by an agreement freely entered into between them, assumes the totality of the debts, it is a principle no less indisputable that he who buys the assets of a bankrupt or a person in judicial liquidation does not owe anything to the creditors of the bankrupt beyond the price of what he buys, a price it is the business of the liquidator to divide according to the rights of those concerned.

Such is the situation of the new company with regard to the liquidator of the Universal Company and with regard to its creditors. This is what has already been declared by the judgment of the 4th of February, 1889, which pronounced the dissolution and the liquidation; this is what has been confirmed by the law of the 1st of July, 1893.

And it is for that very reason—that is to say, that the creditors have no other gage than the product of the realization—that the legislator of 1893, in order to guarantee the personal creditors of the Universal

Company against the consequences of a contribution which would alienate their gage without giving them a sufficient compensation, did not content himself with protecting them by the requirement of the approval of the tribunal. It moreover, aside from any idea of fraud, and merely for the defense of their interest, conferred the right to intervene by way of tierce opposition to the judgment of approval, and submit to the tribunal any objections they might have to the proposed alienation.

Thus, the New Panama Canal Company has not been substituted in the debts of the Universal Company of the Panama Canal. Those debts remain at the exclusive charge of the liquidation. The only charges which burden it are those which were formally transferred to it as conditions of the contribution (art. 5 of the by-laws).

We find here only the charge of the sum remaining due to the Colombian Government as the price of the prorogation of the concession granted April 4, 1893.

There are no others.

Consequently, it is necessary to conclude, without hesitation, that all the personal debts of the Universal Company, other than the above-mentioned debt to the Colombian Government, remain at the exclusive charge of the liquidation.

This is especially true of the entire bonded indebtedness.

And that which we say of debts, a fortiori, we may say of the charges not constituting debts properly so called, which the Universal Company may have assumed in the course of its existence.

We desire to speak here especially of the charge imposed upon the Universal Company by the law of June 8, 1888, concerning the issuing of lottery bonds to buy in France the matériel necessary for the works, a charge absolutely personal and connected with the use of the lottery bonds, of which the new company does not possess one. This obligation is, then, necessarily extinct with the life of the Universal Company, upon which alone it rested, to the existence of which it was in some manner inherent.

It is thus that the vendee of a house in course of construction does not assume, by his purchase, the consequences of a contract which his vendor has made with the contractor for its construction or with an establishment for the furnishing of materials. A formal stipulation is necessary for such a purpose. This could not be imposed upon the new company by the liquidator of the Universal Company, and it has not been imposed upon it, as a reading of article 5 of the by-laws makes clear.

We repeat that the lottery bonds, which were the occasion and the *raison d'être* of the obligation concerning the materials were excepted from the contribution and have remained the exclusive property of the liquidation.

Thus the properties contributed passed into the hands of the New Panama Canal Company absolutely free from the personal indebtedness and personal charges binding the Universal Company.

Let us add that these properties are, moreover, not burdened with any privileged debt or mortgage, nor any *jus in re* or *jus ad rem*, and that their transfer has been made regular, with regard to third parties, by the fulfillment of the formalities required in Colombia.

Thus, and to recapitulate, on this third question, we conclude:

That the New Panama Canal Company is the owner of the properties and rights which it is proposed to cede to the United States of America;

That these properties are free in its hands from all the engagements and personal debts of the Universal Company of the Interoceanic Canal of Panama;

And that they are not and can not be burdened with any other debt or charge than the privileged debts or mortgages which may have been registered according to the laws of the Republic of Colombia.

Let us add, finally, that the transfer of the concession and properties of the Universal Company of the Interoceanic Canal of Panama to the New Panama Canal Company has been formally recognized by the Government of the Republic of the United States of Colombia.

The right of ownership of the new company has moreover been formally confirmed by the prorogation of the concession granted on April 25, 1900, to the New Panama Canal Company by that Government. (Brief of Sullivan and Cromwell, Exhibits, pp. 99 et seq.)

### CHAPTER III.

#### EXISTENCE AND EXTENT OF THE NEW PANAMA CANAL COMPANY'S RIGHT OF DISPOSAL.

We have proven that the New Panama Canal company is the full and complete owner of the concession and other properties the cession of which to the Government of the United States is proposed.

Can it freely dispose of its properties and effect by itself the proposed cession?

The right of ownership, "right to use and abuse," according to the Roman phrase, "right to enjoy and dispose of things in the most absolute way," according to the terms of article 544 of the Civil Code, implies naturally the right to freely alienate.

That right is considered in France as of public interest. The owner can not, in principle, renounce it by agreement. (Aubry & Rau, 11, pp. 175-191; argument, art. 544, 1594, and 1598 of the Civil Code.)

It is immaterial, moreover, whether that owner is a physical being or a moral being—a company. The principles and rules of decision are the same.

Then, in principle, and by the mere fact that we have proven the right of ownership of the New Panama Canal Company, we can affirm its right of free disposal. But we encounter here certain objections, drawn, some from the very object and the existence of the company, and others from the rights given to the liquidation of the Universal Company by the original company agreement.

Let us examine them.

The objections taken from the object and existence of the company are two—

The first is based upon the fact that the proposed cession will put out of existence, along with the company assets, the very object of the company.

It is clearly true that the making of the proposed cession by the New Panama Canal Company to the United States will result in putting an end to the company's object and consequently draw with it the dissolution of the new company. But there is nothing in this that, either legally or under the by-laws, is impossible. In principle, a company constituted with a view to a specified object and for a specified term should exist until the extinction of that object or expiration of that term. (Article 1865 of the Civil Code.)

But that principle, whose strict application can be conceived of in the case of associations of persons, can not be so rigorously enforced in the case of associations of capitals, without presenting the most serious inconveniences and even the greatest dangers, for there may arise, in the course of the existence of a company, even of the most flourishing kind, circumstances in which it will be advantageous and expedient to put an end to the enterprise or transmit it to others by alienation. And the legislator has provided for that case in the law of July 24, 1867, for anonymous companies. By the terms of article 31 of that law, "The meetings which are to deliberate upon the alteration of the by-laws or on propositions to continue the company beyond the term fixed for its duration, or its dissolution before that time, can not be regularly constituted and can not deliberate validly unless composed of a number of shareholders representing the half at least of the capital of the company."

What does this signify, except to recognize in the general meeting—that is to say, in a part only of the associates—the right to put an end to the company existence for whatever reason may please it, whether of expediency or some other kind, without regard to the nonaccomplishment of the object of the company or the noncompletion of the term fixed? (On the powers of the extraordinary general meeting, *Cassation* of May 30, 1892, *Journal des Sociétés*, 1892, p. 405, *Dalloz*, 1893, I, 105, with note of M. Tholler; *Cassation* of January 29, 1894, *Journal des Sociétés*, 1894, p. 209, and reasonings of Advocate-General Desjardins. See also an article of Professor Wahl, *Journal des Sociétés*, 1900, p. 193 et seq.)

And it can not be said that the legislator had in mind in the said article 31 only companies whose dissolution before the fixed time was rendered necessary by the bad condition of their affairs. This would be an error. It is the solvent companies he had in contemplation in article 31 of the law of 1867. And the proof of this is in article 37 of the same law, which provides in that article for the case in which a company has lost, not its whole capital, but only three-fourths of its capital: the legislator does not limit himself to authorizing the general meeting to deliberate on the question of anticipated dissolution, it prescribes that delib-

eration, and it orders that it shall be submitted to a general meeting to which all the stockholders shall be admitted, and which will validly deliberate if only the fourth part of the stockholders shall be represented in it.

Thus the anticipated dissolution of an anonymous company is possible, even where the by-laws are silent, notwithstanding article 1855. *A fortiori* is it possible, beyond any manner of doubt, where the by-laws themselves have expressly provided for it and expressly authorized it. Such is the case for the New Panama Canal Company.

Article 60 of the by-laws, reproducing as to this, article 31 of the law of 1867, formally gives to the general meeting, constituted in the manner specified by articles 61 and 62, the right to decide:

"The reduction of the duration, the prolongation, or the anticipated dissolution of the company." It gives it that right without qualification, without condition. And as the agreement, as we have shown above, is the law of the parties, this, which is part of the company agreement, has established in this respect the power of the company, giving to it, as we see, the greatest amplitude.

The general meeting, constituted in the manner prescribed by articles 61 and 62, can, then, dissolve the company for whatever reason seems to it good. And if it can pronounce that dissolution pure and simple, evidently it can also subject it to whatever condition, to whatever contingency it sees fit; it can vote the alienation of the enterprise which constitutes the company's object in order to dissolve the company in case the alienation takes place. Its will is sovereign. On one hand, the anticipated dissolution, like every dissolution, carries with it inevitably liquidation and the realization of the assets; on the other hand, article 63 of the by-laws of the new company permits the general meeting, in case of dissolution, to confer upon its liquidator or liquidators the most extensive powers.

From these premises we conclude: That the new company can indisputably dissolve itself purely and simply, conferring upon its liquidators the power to make the proposed cession; that not less indisputably it can subject its dissolution to the condition of the making of that cession; and we thus arrive at the conclusion that the new company can, notwithstanding its object and its term of duration, decide upon the projected cession to the United States of America, and give to its council of administration the power to make it, deciding at the same time that upon its being made the company shall be *ipso facto* dissolved. Thus disappears the first objection.

The second objection taken from the object of the new company, concerns the character of that object.

The enterprise, the object of the new company, having a national character, can not be ceded without the consent of the French Government. Such is the objection. It rests, as we have seen in the explanations given in the first chapter of this paper, upon an altogether erroneous assumption.

From the point of view of French statutory and other French law the



Panama Canal enterprise is an ordinary industrial enterprise, essentially private, absolutely independent of the public authorities of France, who have never intervened, either in its constitution or carrying it on.

It is necessary, besides, to beware of the phrase "national work," which does not convey a very clear idea to the mind and which has no place in legal language. Without doubt one can say that a work is national when from its nature or its size it may be of importance to the whole country, may increase its fame with that of its citizens, its influence, or its material prosperity. But these statements and the legitimacy of the expression so made use of and which concerns the moral order of things, or mere sentiment, may be without any legal significance. There is no national work in law except one that is carried on directly by the nation itself; no national property except one which belongs, properly speaking, to the nation. The enterprises of individuals—and we know that the old and new Panama companies were formed without any intervention of the State—are private things and works. The fact that it may have a national character in Colombia could not give the French Government a right which does not arise from its own law.

The objection is, in fact, based on an abuse of the word "national." How can a work, because it is important to a foreign government, come under the authority of another government from the simple fact that subjects of the latter carry it on? There exist in the world quite a number of companies, purely private, that carry on in divers foreign countries enterprises of public or national concern in those countries. Such are, for example, the enterprises of railroads constructed by French or English companies in South America. Such companies have never been anything but private companies, and no one has ever contested the right they have often made use of to alienate their enterprises to third persons whenever the concession does not prohibit alienation.

The objection, then, has not any serious character, either in law or in fact; it rests merely upon the word "national" turned away from its true meaning. It has often been said in France that the Suez Canal enterprise is a national enterprise. The company which carries it on is, however, a private company absolutely mistress of its rights.

Besides, from the point of view of Colombia, the work of the new company is not a national work; it is a private work, which is recognized by the decrees of concession to be a private enterprise, capable of being sold to any individual or company (article 21, law of May 18, 1878), of being ceded by one company to another (article 1, law of December 26, 1890), and with regard to the free alienation of which only one reservation is made—the case of a sale to a foreign government (article 21, law of May 18, 1878).

The new company has no political character or obligation, and neither France nor Colombia has set up any pretension of the kind.

We are, then, through with the objections taken from the object of the company, and come now to those drawn from the rights granted to the liquidation of the Universal Company by the original constitutive agreement.

This objection may be thus stated:

By the terms of the stipulations made in its original company agreement, the new company accorded to the Universal Company 60 per cent of the profits of operating the canal in return for its contribution.

This 60 per cent is the price of the contribution.

That price can not be altered.

But it would be an alteration to sell the concession and properties that go with it for a fixed sum.

Then the sale is impossible.

Such is the objection.

Let us see what it is worth.

We remark in the first place that the liquidator could foresee, and did foresee, when he was making the contribution to the new company of the properties it is proposed to cede to the Government of the United States, that the share in the profits of the operation of the canal which he was stipulating for as compensation, as the price of his contribution, might be replaced, in future contingencies, by another compensation. In giving adhesion to the by-laws of the new company, in which he is moreover a subscriber to shares payable in money, at the same time that he is a contributor of property in kind, he should have considered and he did consider, like all others interested, the meaning and effect of article 60 of the by-laws, hereinbefore analyzed; he was acquainted, besides, with article 31 of the law of July 24, 1867, which binds all persons. He has, then, accepted in advance the eventuality of an anticipated dissolution and, therefore, the possibility of an alienation of the enterprise, rendering impossible for the future the carrying out of the stipulation which gives him 60 per cent of the benefits of operation. Yet it is to be observed that the liquidator made no special stipulation in view of such an event; he did not require for himself a different treatment from that of all others concerned. All will be obliged to content themselves with some other benefit than that of receiving shares of the annual profits and proceeds, if any. We see, then, that from this first point of view the objection is already gotten rid of, especially if it is added, in view of the texts of the law, that it is impossible to conceive of a contract contrived in such a way that the parties would not be able to profit by favorable events in the future or escape future perils, under the pretense that these events were not specifically provided for.

We repeat, then, that the liquidator, having given adhesion to article 60 of the by-laws, liquidation and alienation were things provided for between the parties, and therefore they are in no sense impossible.

We shall examine, in view of the *fait accompli*, the objection stated. It will be explained away quite easily if, taking the hypothetical case of a sale pure and simple, we leave out of view the particular case of an alienation in the form of a contribution to an anonymous company.

It is incontestible in principle that a vendee can not, at his own will, alter what he has engaged himself to give to the vendor as the price of the thing sold.

But it is not less so that, if the vendee can not alone alter his promise

to the vendor, such an alteration can be agreed upon between them without the rights of ownership of the vendee being in any way changed.

It is very clear, for example, that if I buy a piece of immovable property, agreeing to pay an annuity to the vendor, I can not, by my own sole power, free myself by turning that annuity into a lump sum; but I can certainly do so by agreement with my vendor without this alteration of the price first stipulated affecting in any way the transmission of ownership which takes place by virtue of the original contract. (Article 1583 of the Civil Code.)

What can be done between individuals, physical beings, can be done likewise between moral beings, between companies. There is no reason for a distinction in the two cases, and it can not be supposed that companies which are the great instruments of modern activity are in a situation less advantageous than individuals.

But what is in fact the state of affairs here?

On one hand the new company has undertaken to do nothing without the agreement and consent of the liquidator.

On the other hand, the liquidator, the subject of the cession having been submitted to him by the new company, being desirous of favoring negotiations the value of which his great experience and his knowledge of the interests confided to him enable him to estimate, wishing to give to those negotiations a support the more effective by reason of his sharing the responsibility, has applied to the tribunal that commissioned him, and has asked of it to have settled by friendly arbitration the questions to which the cession might give rise as between the liquidation and the new company, and especially the question of the division of the price, and the tribunal, by judgment of August 2, 1901, has given him the authority thus asked for. (See the text of the said judgment; brief of Sullivan & Cromwell; exhibits, pp. 253 et. seq.)

Under these circumstances there was signed on the 24th of December, 1901, by the new company and the liquidator, M. Gautron, a document setting forth the agreement between them. (See brief of Messrs. Sullivan & Cromwell; exhibits, p. 261.)

By the terms of this document the parties—

Have determined (article 1) that "The New Panama Canal Company shall be alone charged with carrying on the negotiations with the Government of the United States;" that it "shall have all powers for ultimately coming to terms with it, and for settling with it the price and the conditions of the cession,"

And they constituted (articles 2 to 4) an arbitration tribunal to decide the question to be settled between them, the question of the division of the price.

The arbitration tribunal rendered its decision on the 11th of February, 1902. (See brief of Sullivan & Cromwell; exhibits, supplement, p. 271.)

Thus, and pausing here in the account of what was done, the agreement by the liquidator to the alteration which the sale will make in what is due him is clear and indisputable.

If there is an alteration in what was settled by the original agreements, this alteration made by agreement is undoubtedly valid and lawful.

The matter all comes, indeed, to a question of the power of the liquidator, and after the examination of it already herein made that power is no longer doubtful, provided only the special formalities are followed which arise from his character as liquidator and from the special law which governs him.

In the beginning he would have had the right, beyond a doubt, to alienate the properties and rights of the liquidation for a fixed sum in money; thinking to do better, he stipulated for a share of the profits.

Later, he believes it advantageous to sell that share of the profits, to convert it into cash; why has he not the right to do so, provided he conforms in that alienation to the character with which he is invested?

And why, if he can do that with a third party, can not he do it with his vendee, and give up for a fixed sum a part of the profits which he quite reasonably looks for?

How can it be maintained that, because in the beginning he thought it advantageous to stipulate for a certain price in exchange for his contribution, he can not, circumstances changing, alter also, in agreement with his vendee, the price agreed upon?

In every country of the world, he who has the right to cede a thing, to stipulate accordingly the price of that cession, has equally the right to alter that price if the other party consents thereto.

Is it necessary to dwell longer upon this?

We believe not.

And we hold as certain that the liquidator of the Universal Company can give a valid assent to the modification or transformation of the rights arising in favor of the liquidation from the contribution he made in its behalf, provided he gives it in accordance with the formalities that were requisite for the validity of that contribution, the formalities, in a word, required to validate his acts of alienation.

The question, the only question that can be made, is, then, as to the observance of the requirements of the law of July 1, 1893.

And these formalities have been observed.

The liquidator, M. Gautron, gave the civil tribunal of the Seine possession, according to the provisions of article 10 of the law of July 1, 1893, of a request for approval of the award of the arbitrators, and of the assent he gave to the modification to be made in the contract of contribution entered into in 1894 between the liquidator and the new company in order to allow the cession to the United States.

Within the month from the publication of the said judgment in the Official Journal, and the Official Journal (commune edition) in conformity with article 11 of the law of July 1, 1893, a publication throwing open for a month, for a month only, according to the same article, the opportunity for tierce opposition to the stockholders, to the mandataire of the bondholders, and to the company's creditors other than

bondholders; that is to say, to all interested and to the only ones who could possibly be interested, one tierce opposition was interposed, only one.

The civil tribunal of the Seine was put in possession of that tierce opposition, and at the same time of a prohibition served upon the new company by the tiers opposant and notified by him to the Government of the United States of America.

By judgment of July 3, 1902, the tribunal rejected the tierce opposition on the ground of its inadmissibility based upon the tiers opposant's character as a bondholder, the law of July 1, 1893, not giving to bondholders the individual right to make the tierce opposition provided for by its article 11, a ground of inadmissibility of public order, which was obligatory upon the tribunal to take notice of and enforce even if the liquidator had not made the point.

Let us observe, also, that in the discussions, with an enlightened care for the well-understood interests of which he had charge, the mandataire of the bondholders, M. Lemarquis, intervened, in order to declare emphatically that he was fully in accord with the liquidator and that it was deliberately and intentionally that he had omitted to make use of the right of tierce opposition that he alone had on behalf of the mass of bondholders. Let us also make a note of the fact that by the same judgment, the tribunal, upon the request of the new company, threw out the prohibition served by the tiers opposants, the two proceedings having been united.

Finally, getting jurisdiction in its turn, the court of appeals of Paris, by decree of August 5, 1902, confirmed in all respects the judgment of July 3, 1902.

The approval given on the 19th of March, 1902, to the agreements made has, accordingly, become definitive.

Consequently, no one is able to-day and no one will be able to criticize or put in doubt those agreements. The law of July 1, 1893, the expiration of the time allowed to enter objections as authorized by it, the force of *res adjudicata*, absolutely prevent anything of the kind.

And these agreements formally recognize in the new company the power to negotiate and to conclude alone with the Government of the United States of America the cession in question.

Who, then, can reasonably doubt that it can validly do so?

#### CONCLUSIONS.

We have established that the New Panama Canal Company was regularly constituted; that it is entirely distinct from the Universal Company of the Interoceanic Canal of Panama, at present dissolved and in liquidation; that a dissolved company, with us, continues to exist for the requirements of its liquidation, but only for those requirements, that it is dead in all other respects, and can not reorganize itself in the English or American sense of the word—and we have thus responded to the third question.

We have established also that the New Panama Canal Company and the Universal Company of the Inter-oceanic Canal of Panama, the one a commercial company, the other a civil company, are both essentially private companies, not having in any degree in France a national character—and thus is answered the fifth question.

We have then established:

1. The regularity and irrevocable nature of the contribution made by the liquidator of the Universal Company to the new company and definitively approved by the civil tribunal of the Seine according to the provisions of the law of July 1, 1892, showing that in France no jurisdiction can weaken the binding force of a law regularly promulgated (question No. 8).

2. That by this contribution the new company became from the moment of its organization the exclusive owner of the concession, of the works of the canal, and of all the other properties it is proposed to cede to the Government of the United States. That this ownership is, in its hands, absolute, that it carries with it the effects set forth in article 544 of the Civil Code; that it is not burdened with any charge other than that stipulated in the contract of contribution; that is to say, to pay either the price agreed upon or that which may be regularly substituted.

3. That neither the new company, nor the property contributed to it, is bound in the way of either personal or real indebtedness in favor of the liquidation, by any charge other than the above mentioned; that, especially, no debts or charges of the Universal Company in favor of bondholders, stockholders, or any other creditors weigh upon it.

4. That the rights granted by the New Panama Canal Company to the liquidation of the Universal Company, in return for the contribution received from it, do not paralyze, in its hands, the right of free disposal which is the natural incident of the right of ownership.

We have shown, further and superabundantly, as to this last point:

- (a) That by the provisions of the agreements entered into between it and the liquidator of the Universal Company, acting in the plenitude of its rights, the new company has become, in all respects, alone charged with negotiating, with coming to an agreement, with closing with the Government of the United States, without, moreover, these arrangements having invalidated or altered in any way its original ownership.

- (b) That the document setting forth these agreements, and also the full and entire assent of the liquidator of the Universal Company to the proposed session and the modification of the price of his contribution, has received, in accordance with the provisions of articles 10 and 11 of the law of July 1, 1893, a definitive approval.

From this we derive with absolute certainty answers to questions 1, 2, 4, 6, and 7:

That the New Panama Canal Company acquired, on the day of its organization, an absolute and certain title to the concessions, to the works of the canal, and to all the other properties which it is proposed to cede to the United States (question 1);

That that title of ownership was not invalidated or altered by the

agreements of December, 1901, entered into between the new company and the liquidator of the Universal Company, acting in the plenitude of his rights and under the definitive sanction of the civil tribunal of the Seine, according to the provisions of the law of July 1, 1893 (question 6);

That the New Panama Canal Company has the power to proceed by itself alone to make the proposed cession (question 2);

That by this cession the United States will obtain the full and entire ownership of the properties ceded;

That this ownership will be transmitted to them free and clear of all the personal debts and charges of the Universal Company of the Inter-oceanic Canal, and especially of all the bonded indebtedness of the said company and of the obligation imposed upon it by the law of June 8, 1888, debts and charges which do not directly affect properties, but the person, and consequently not on one hand following the properties when alienated and when contributed to the new company, nor on the other hand being imposed upon the latter as a condition of that contribution, and therefore not resting in any way upon the new company personally or upon its properties (questions 4 and 7);

We have shown finally, having in view a special objection belonging to the third question, that the fact that the proposed cession will put an end to the company's object and carry with it, from the nature of things, the dissolution of the new company, can not paralyze the right of disposal of the new company, this company having from the law and its by-laws the right to dissolve itself by anticipation.

And we conclude, formally, in affirming the absolute regularity of the cession when made by the council of administration of the New Panama Canal Company (or, say, by its members, specially delegated to that effect), and ratified by extraordinary general meeting, which meeting should, moreover, the cession having become definitive and the company's object at an end, pronounce the dissolution of the company and name some liquidators intrusted with receiving and distributing the price of the cession thus sovereignly agreed to by the company.

Deliberated at Paris the 1st of September, 1902.

(Signed.)

LEON DEVIN,  
*Former Batonnier.*

H. DU BUIT,  
*Former Batonnier.*

LIMBOURG,  
HENRI THIÉBLIN,  
PAUL GONTARD.

We, the undersigned general counsel in America of the New Panama Canal Company, having participated in the conferences and studies leading to the foregoing opinion, do hereby express our full concurrence therein.

Dated Paris, September 1, 1902.

SULLIVAN & CROMWELL,  
*General Counsel.*

**EXHIBIT 3.**

**LAWS OF 1867 AND 1893 CONCERNING COMPANIES.**

A LAW concerning companies, enacted on the 24th day of July, 1867.

**COMPANIES OF COMMANDITE PAR ACTIONS.**

(Art. 1 providing that, before being definitely constituted, the whole stock must be subscribed and a part paid in, etc.; modified by the law of August 1, 1893.)

ART. 2. The shares or coupons of shares are negotiable after the payment of one-quarter.

(Art. 3, making the original subscribers and transferees responsible for the balance when shares sold before one-half paid in; modified by the law of August 1, 1893.)

ART. 4. When an associate makes a contribution which does not consist in money, or stipulates for his benefit special advantages, the first general meeting appraises the value of the contribution or ground for the stipulated advantages. The association is not definitely constituted except after the approval of the contribution or of the advantages given, by another general meeting after a new call for one. The second general meeting can not pronounce the approval of the contribution or of the advantages, except after a report, which shall be printed and held at the disposal of the shareholders five days at least before that meeting. The votes are taken by a majority of the shareholders present. The majority must include a quarter of the shareholders and represent a fourth of the company's money capital. The associates who have made the contribution or stipulated for the advantages aforesaid can not vote at such meeting. On failure of approval the association remains without effect with regard to all the parties. The approval constitutes no obstacle to a suit based upon fraud or wrongdoing. The provisions of the present article concerning the verification of the contribution, which does not consist in money, are inapplicable to the case in which the company to which the contribution is made is formed among those only who are the owners of the contribution in undivided shares.

\* \* \* \* \*

ART. 17. The shareholders, representing the twentieth, at least, of the company capital, can, in their common interest, authorize at their expense one or several mandataires or agents to sustain, as plaintiff or defendant, an action against the managers or against the members of the council of surveillance, and to represent them in that case in court without prejudice to the individual right of action of each of the shareholders.

\* \* \* \* \*

**II. ANONYMOUS COMPANIES.**

ART. 21. In future, anonymous associations may be formed without authorization from the Government.

Whatever be the number of associates or members, such companies



henceforth may be formed by document drawn up without notarial aid, and made in duplicate.

They will be governed by the provisions of articles 29, 30, 32, 33, 34, and 36 of the Code of Commerce (these articles are not restrictive but concern the naming of the company, the division of the capital into shares, the limitation of responsibility to the amount of the capital, and the like), and by those set forth under the present heading.

ART. 22. Anonymous companies are directed or managed by one or more attorneys or mandataries delegated for the purpose for a specified period of time, and whose powers are revocable; they may or may not receive a salary, but are chosen from among the associates of the company.

These attorneys or representatives may, in turn, select a manager from their own number, or, if the association's by-laws permit, they may delegate their own powers to an attorney unconnected with the company, but for whose acts they remain responsible to the said company.

ART. 23. The company can not be formed if the number of members or associates is below seven.

ART. 24. The provisions of articles 1, 2, 3, and 4 of the present act are applicable to anonymous companies.

In the case of anonymous companies, the declaration or statement required of the manager by article 1 must be made by the founders of the concern. This declaration or statement is submitted, together with the documents in support of it, to the first general meeting, which ascertains its genuineness.

ART. 25. In any case, a general meeting is to be called, by care of the promoters of the company, subsequently to the establishment of the subscription of the capital stock and of the payment of one-fourth of the money capital. This meeting appoints the first administrators; it appoints likewise, for the first year, the commissaires or supervisors provided for by article 32 hereinbelow.

These administrators can not be appointed for more than six years; they may be reelected, save where the by-laws stipulate to the contrary.

They may be named or designated by the by-laws, with an express provision that their appointment shall not be submitted to the general meeting for approval. In this case they can not be named for more than three years.

The minutes of the meeting note the acceptance of the administrators and commissaires or supervisors present at the meeting.

The due formation and establishment of the company dates from this acceptance aforesaid.

ART. 26. The administrators must own a certain number of shares, to be determined by the by-laws of the company.

These shares are answerable as a whole as a guarantee for all the acts of the management, even for the exclusively personal acts of one of the administrators.

They are in the name of the holders (not to bearer), untransferable, and bear a stamped indication of their nontransferability, and are deposited in the company treasury.

ART. 27. A general meeting is held, at least once a year, at the time appointed by the by-laws. The by-laws determine the number of shares which one must hold, either as owner or as attorney, in order to obtain admission to the meeting; also the number of votes falling to each shareholder in consideration of the number of shares held by him.

However, in those general meetings which are called for the purpose of verifying contributions, of naming the first administrators, and of ascertaining the genuineness of the declaration or statement made by the founders of the company in accordance with the second paragraph of article 24 hereof, every shareholder may, regardless of the number of shares held by him, take part in the deliberations and cast the number of votes determined by the by-laws; provided, however, the said number of votes does not exceed ten.

ART. 28. In all general meetings a majority of votes shall carry. A roll-call sheet is kept, to be signed by all members present. It bears the names and residences of the shareholders, as well as the number of shares held by each one of them.

This list is certified to by the presiding board of the meeting, and is deposited at the main office of the company. It must be shown to anyone applying to see it.

ART. 29. General meetings called for other purposes than those set forth in the two articles following must be attended by a number of shareholders representing at least one-fourth of the capital stock.

Should the general meeting not receive this attendance, a new meeting is called according to the forms and within the space of time prescribed by the by-laws. The deliberations and acts of this new meeting will be valid, whatever may have been the proportion of capital stock therein represented by the shareholders present.

ART. 30. Meetings called to deliberate on the verifying of contributions, on the appointment of the first administrators, on the genuineness of the declaration or statement made by the founders, as required by paragraph 2 of article 24 hereof, must be attended by a number of shareholders representing at least one-half of the capital stock.

In computing the capital stock, one-half of which must be represented at a meeting for verifying a contribution, contributions which are free from this verifying requirement are alone to be taken into account.

Should the general meeting represent less in its attendance than one-half of the capital stock, it can take only a temporary decision. In this case, a new general meeting is called.

The temporary decisions taken by the first meeting are made known to the shareholders by publication at two distinct times, at an interval of eight days from each other, one month at least in advance of the new meeting, said publication to be made in some newspaper designated to receive legal notices. The decisions in question become final when they are confirmed by the new meeting, provided the attendance at said meeting represents one-fifth at least of the capital stock.

ART. 31. Meetings having to deliberate on amendments to the by-laws, or on motion to prolong the existence of the company beyond the time

agreed on, or to dissolve said company before the date appointed for such dissolution, are deemed to be regularly and duly held, and their decisions are considered valid only when the attendance at such meetings represents at least one-half of the capital stock.

ART. 32. The annual general meeting appoints one or more commissaires, whether members or not of the company, whose duty it will be to present to the general meeting of the following year a report on the situation and condition of the society or company, on the balance sheet, and on the accounts presented by the administrators.

The approval of the balance sheet and of the accounts aforesaid is null and void if it has not been preceded by this report of the said commissaires or supervisors.

In case the general meeting has failed to name the commissaires or supervisors aforesaid, or in case one or more of the said officials be prevented or refuses to serve, their appointment or substitution is effected by an order of the president of the tribunal of commerce sitting at the legal residence of the company, on the request of any party interested, and after due summoning of the administrators.

ART. 33. During the three months next preceding the date set by the by-laws for the holding of the general meeting the commissaires or supervisors have the power and authority to look over the books and to examine into the operations and workings of the company as often as they may deem it expedient for the good of the concern.

They may at any time in urgent cases summon a general meeting.

ART. 34. Every anonymous company must draw up, once in six months, a summary of its debit and credit accounts.

This summary is kept at the disposal of the commissaires or supervisors.

Moreover, an inventory is drawn up every year, as required by article 9 of the code of commerce, giving a statement of the personal and real property of the company, besides a report of all debts due to and by the company.

The inventory, the balance sheet, and the profit and loss accounts are placed at the disposal of the commissaires at least forty days before the general meeting. They are presented to this meeting.

ART. 35. At least fifteen days before the general meeting is held every shareholder may view the inventory and the list of shareholders at the main office of the company, and may require a copy of the balance sheet summing up the inventory, as well as a copy of the commissaires' report.

ART. 36. Every year an assessment of one-twentieth at least is made and levied on the net profits for the purpose of forming a reserve fund.

This assessment will cease to be obligatory whenever the reserve fund shall have reached a sum equal to one-tenth of the capital stock.

ART. 37. In case the company should have sustained the loss of three-fourths of its capital stock, the administrators must call a general meeting of all the shareholders for the purpose of considering the advisability of dissolving the company.

Whatever may be the decision taken by the company it is announced by publication.

Should the administrators fail to call the general meeting aforesaid, or in a case where the said meeting can not be brought together in a regular manner, any party interested may petition the tribunals for a dissolution of the company.

ART. 38. Dissolution may be decreed on the request of any interested party where for more than a year the number of members has been less than seven.

ART. 39. Article 17 is applicable to anonymous companies.

ART. 40. Unless they be authorized by the general meeting, the administrators are prohibited from either taking or preserving an interest, whether direct or indirect, in an undertaking or in a contract made with the company or in its behalf.

Every year a report is presented to the general meeting rendering special account of the manner in which enterprises or contracts authorized by it, in accordance with the terms of the preceding paragraph, have been carried out or executed.

ART. 41. Any anonymous company, in the formation of which due observance has not been had of the requirements set forth by articles 22, 23, 24, and 25 herein above, is null and void with regard to the interested parties.

ART. 42. When, in accordance with the terms of the preceding article, the company or its acts and deliberations have been annulled, the founders who were the cause of the nullity and the administrators who were in office when the nullity was incurred are jointly responsible to third parties, without prejudice to the rights of shareholders.

The same joint responsibility may be decreed against those members whose contributions or special advantages have not been verified and approved, as prescribed by article 24, and in compliance therewith.

ART. 43. The extent and effects of the commissaires' responsibility to the company depend on the terms of the instrument appointing them.

ART. 44. The administrators are responsible in accordance with law, individually or jointly, as the case may be, to the company or to third parties, for breach of the provisions of the present act, and for faults committed by them in their management, such, for instance, as the distributing or allowing the distribution of fictitious dividends, without opposing the same.

ART. 45. So far as they concern anonymous companies, the provisions of articles 13, 14, 15, and 16 of the present act apply without distinction to those companies which are actually in existence and to such as will be formed under the said present act. Such administrators as may have brought about fictitious dividends in the absence of an inventory, or by means of false inventories, will suffer the penalty provided for such cases by No. 3 of article 15 against the managers of mixed joint stock companies. [Articles 13, 14, 15, and 16 provided penalties merely, especially for violations of articles 1, 2, and 3, and frauds in connection with subscriptions, payments, etc.]

The provisions of the last three paragraphs of article 10 are likewise applicable in so far as they concern anonymous companies. [Article 10 provides for a council of surveillance to report irregularities, etc.]

ART. 46. Anonymous companies now existing shall continue, so long as they endure, to be governed by the provisions to which they are subject.

On obtaining the authorization of the Government, and observing the forms prescribed for the modification of their by-laws, they may transform themselves into anonymous companies within the terms of the present act.

ART. 47. Companies having a limited liability may transform themselves into anonymous companies within the terms of the present act by observing the conditions stipulated for the modification of their by-laws.

Articles 31, 37, and 40 of the code of commerce, and the law of May 23, 1863, concerning companies with limited responsibility, are hereby repealed.

### III. SPECIAL REGULATIONS FOR COMPANIES WITH VARIABLE CAPITAL.

ART. 48. The by-laws of any company may provide for an increase of the capital stock, either by successive payments made by the members or by the admission of new members, and for a decrease of the capital stock by a withdrawal, either total or partial, of the contributions made.

Companies whose by-laws shall contain the said provisions shall be governed, in addition to the general regulations governing them in view of their nature, by the provisions of the following articles:

ART. 49. The by-laws governing the company shall not provide for a capital stock in excess of the sum of two hundred thousand francs.

This may be increased from year to year by the general meeting, though no one increase thus decided upon shall exceed the sum of two hundred thousand francs.

ART. 50. The shares or fractions of shares shall be in the name of the holder (not to bearer), even after they may have been fully paid.

They shall be negotiable only after the final formation of the company.

Such negotiation can be effected only by a transfer on the books of the company, and the by-laws may vest either in the council of administration or in the general meeting the power of opposing such transfer. (See law of August 1, 1893, article 6.)

ART. 51. The by-laws shall fix a sum or amount below which it shall be unlawful to reduce the capital stock by withdrawal of contributions as provided by article 48.

This sum or amount shall not be less than equal to one-tenth of the capital stock.

The company shall be deemed finally formed and constituted only after the payment of one-tenth at least of the capital stock.

ART. 52. Any associate may withdraw from the company when he sees fit, save where there is an agreement to the contrary and save where this would entail a breach of paragraph first of the preceding article.

It may be stipulated that the general meeting shall have power to decide, by the majority required for a modification of the by-laws, upon the striking off from the list of members or associates one or more of the names thereon.

An associate who ceases to belong to the company, whether of his own accord or as the result of the decision of the general meeting, shall remain responsible to the associates and to third parties for all the obligations existing at the time of his withdrawal, during a period of five years occurring next after said withdrawal.

ART. 53. Whatever be the form of the company, its administrators shall be the proper parties to represent it before the courts.

ART. 54. The company shall suffer no dissolution on account of the death, retirement, interdiction, bankruptcy, or failure (*déconfiture*) of one of the associates; it will continue in full force between, and as to, the other associates.

#### IV. RULES TOUCHING THE PUBLICATION OF ARTICLES OF AGREEMENT.

ART. 55. Within the space of one month from the formation of any commercial company or association, there shall be deposited in the office of the peace justice court and in that of the tribunal of commerce within whose jurisdiction the company is formed a duplicate of the articles of agreement constituting the basis of the company, if these articles are unauthenticated, or a certified copy of the same if they have been acknowledged before a notary.

In the case of mixed joint-stock companies (*en commandité*) and of anonymous companies, there shall be appended to the said articles of agreement (1) a copy of the notarial document showing the subscription of the capital stock and the one-fourth payment prescribed by the present act; (2) a certified copy of the decisions adopted by the general meeting in the cases provided for by articles 4 and 24.

Moreover, there must be joined to the articles of agreement, when the company is an anonymous one, a duly certified and authenticated list of the subscribers, giving the name, surname, occupation, residence of each one, as well as the number of shares held by each associate.

ART. 56. A copy of the articles of agreement and of the appended documents is published, within the space of one month aforesaid, in one of the newspapers designated for legal notices.

This publication in said newspaper shall be proved by a copy of the paper in question, duly certified to by the printer, authenticated by the mayor, and recorded within three months from the date thereof.

A failure to observe the prescriptions of the preceding article and present article will nullify the entire proceedings as to the associates of the company; but no breach of any of said prescriptions may be pleaded by the members as against third parties.

ART. 57. The copy above-mentioned must contain also the names of associates other than shareholders; the official name adopted by the company and the locality of its legal residence; the names of such associates as are authorized to manage, direct, and sign for the company; the amount of the capital stock and the amount of the values furnished or to be furnished by the shareholders; the date of the launching of the company and that of its intended dissolution, as well as the time at which the deposits of documents aforesaid were made in the offices of the peace justice court and of the tribunal of commerce.

ART. 58. The copy must state whether the company is one under a collective name, or en commandite simple, en commandite by shares, or anonymous, or one with variable capital.

If the company is anonymous, the copy must state the sum of capital stock paid in specie and the sum paid otherwise than in specie, together with the amount of pro rata assessment which must be levied on the profits in order to constitute the reserve fund of the company.

Finally, if the company is one with variable capital stock, the copy must indicate the sum or amount below which the said capital stock can not be lawfully reduced.

ART. 59. In case the company have several establishments doing business in various districts, the deposit prescribed by article 55 and the publication required by article 56 must be made in each district where such establishments exist.

In such cities as are divided into several districts it will be sufficient to make said deposit in the office of the peace justice court within whose jurisdiction or district lies the chief of these establishments.

ART. 60. The copy of the acts and documents deposited is to be signed, in the case of public official documents, by the notary; in the case of documents under private signature merely by the associates in collective name, by the managers of associations en commandite, or mixed joint stock companies, and by the administrators in the case of anonymous companies.

ART. 61. The formalities prescribed and penalties imposed by articles 55 and 56 apply to:

All acts and resolutions looking to the amendment of the company's by-laws, to the prolongation of the company's existence beyond the period of time originally agreed upon and fixed, to dissolution before the expiration of the said period of time, and to the manner of winding up the affairs of the concern, to any change in the official name of the company or to any change among, or withdrawal of, members.

Such decisions as are arrived at in the cases provided for by articles 19, 37, 46, 47, and 49, herein above set forth, are also governed by the requirements of articles 55 and 56. (Art. 19 concerns associations en commandite.)

ART. 62. The following documents are not subject to the deposit and publication requirements aforesaid: Documents setting forth an increase or decrease of the capital stock, made in accordance with the terms of article 48 herein above, or the withdrawal of members other than man-

agers or administrators, such withdrawal taking place within the terms of article 52 hereof.

ART. 63. In the case of mixed joint-stock companies or of anonymous companies, any person may demand a view of the documents deposited in the office of the peace justice court and of the tribunal of commerce, and may even demand, at his own cost, a certified copy of the said documents, from the court clerk or from the notary in charge of the same.

Likewise any person may, for a sum not exceeding 1 franc, demand at the legal residence of the company a certified copy of its by-laws.

Finally, a copy of the deposited documents must be publicly exposed in the offices of the company.

ART. 64. In all acts or documents, invoices, notices, publications, etc., whether *printed* or *holographic*, emanating from anonymous companies or from mixed joint-stock companies, the official name of the concern must always be followed by these words, written out in full and legibly: "*Anonymous company*," or "*Mixed joint-stock company*," together with the amount of the capital stock.

In case the company has availed itself of the right granted it by article 48 hereof, this must be shown by the addition of the following words, "*with variable capital stock*."

Any breach of the preceding requirements is punished with a penalty or fine of not less than fifty nor more than one thousand francs.

ART. 65. Articles 42, 43, 44, 45, and 46 of the Code of Commerce are hereby repealed.

LAW OF AUGUST 1, 1893, AMENDING LAW OF JULY 24, 1867, CONCERNING ASSOCIATIONS HAVING SHARES OF STOCK.

ARTICLE 1. Paragraphs 1 and 2 of article 1 of the law of July 24, 1867, are modified as follows:

Paragraph 1:

"Associations of commandite can not divide their capital into shares or parts of shares of less than 25 francs when the capital does not exceed 200,000 francs, of less than 100 francs when the capital exceeds 200,000 francs."

Paragraph 2:

"They can not be definitively constituted except after subscription of the total capital and the payment in cash by each shareholder, of the amount of the shares or parts of shares subscribed by him, when they do not exceed 25 francs, and of the quarter at least of the shares when they are of 100 francs and over."

2. Article 3 is altered thus:

"The shares are in shareholders' names [i. e., not to bearer] until fully paid up (*entière libération*). The shares representing contributions shall be free (considered paid up) from the time of the definitive organization. These shares can not be withdrawn, and are not negotiable before two years after the definitive organization of the association.



The owners, intermediate transferees, and the subscribers are bound in solido for the amount of the shares. Every subscriber or shareholder who has transferred his share, ceases, two years after the transfer, to be responsible for the payments not called for."

3. To article 8 are added the following provisions:

"The suit to have declared the nullity of the association or of acts and votes subsequent to its constitution, is inadmissible when, before suit brought, the cause of nullity has ceased to exist. The action to enforce responsibility for the facts from which the nullity resulted, ceases also to be admissible when, before suit brought, the cause of nullity ceases, and if, besides, three years have elapsed since the date when the nullity arose. If, to put an end to the nullity, a general meeting should be called, the action of nullity will not be admissible after the date of the regular calling of that meeting. Actions of nullity against acts constituting the association are prescribed in six years. This prescription can not be made use of before the expiration of the ten years following the promulgation of the present law."

4. To paragraph 1 of article 27 is added the following:

"Owners of shares less than the number determined to qualify for admission to meetings can unite to make up the proper number and be represented by one among them."

5. In paragraph 1 of article 42, for the words "responsible in solido to third persons without prejudice to the rights of shareholders" is substituted the following: "responsible in solido to third persons and to the shareholders for the damage resulting from that annulment."

To the same article is added the following paragraph:

"The action for nullity and that upon responsibility resulting from it are subjected to the provisions of article 8 above."

6. To the law are added the following provisions:

#### "DIVERS PROVISIONS.

"ART. 68. *Whatever may be their objects, associations of commandite or anonymous associations which shall be constituted in the manner given in the Code of Commerce or in the present law are subjected to the laws and customs of commerce.*

"ART. 69. Hypothecation (mortgage) can be consented to in the name of every commercial association by virtue of the powers resulting from its act of formation, even when that is a now notarial document, or from votes or authorizations taken or made in the manner prescribed by the said act. The document of hypothecation shall be authenticated as provided in 2127 of the Civil Code.

"ART. 70. In cases in which associations have continued to pay the interest or dividends of stock, bonds, or other certificates of obligation by way of a drawing by lot, they can not repeat these sums when the certificate is presented for reimbursement.

#### "TRANSITORY PROVISIONS."

\* \* \* \* \*

EXHIBIT 4.

JUDGMENT OF MARCH 19, 1902 (CIVIL TRIBUNAL OF THE SEINE), APPROVING LIQUIDATOR'S CONSENT TO SALE.

GAUTRON, IN HIS OFFICIAL CAPACITY,	} First division. First section.
<i>versus</i>	
NEW PANAMA CANAL COMPANY.	No. 4.

REPUBLIC OF FRANCE, *In the name of the people of France:*

The civil tribunal of first instance of the department of the Seine, sitting at the palace of justice, renders in open and public session of its first division, the judgment the tenor of which is as follows:

Hearing of Wednesday, March 19, 1902.

The COURT, In view of the request presented by Gautron, in his official capacity of liquidator for the Universal Interoceanic Canal Company of Panama, said request being signed by De Biéville, his solicitor and worded as follows:

*To the honorable president and justices of the first division of the civil tribunal of the department of the Seine:*

The petitioner, M. Pierre Gautron, liquidator of the Universal Interoceanic Panama Canal Company, residing at the office of the liquidation, Chaussée d'Antin street, No. 42, having de Biéville as solicitor, has the honor to state:

That negotiations are pending between the New Panama Canal Company and the United States Government for the transfer to said Government of the whole of the rights and property owned by the New Panama Canal Company on the Isthmus of Panama as well as its maps and records in Paris.

That these negotiations have resulted in an offer made by the new company to the United States of America for the transfer of said property in return for the sum of \$40,000,000 (i. e., about 205,000,000 francs), said offer to remain in force until March 8, 1903.

That the liquidator of the Universal Interoceanic Panama Canal Company has been informed of the negotiations and the offer above referred to.

That certain differences having arisen between the new company and the petitioner in his capacity of liquidator, M. Gautron, in his said capacity, has been authorized by decree of the civil tribunal of the Seine, dated August 2, 1901, to compromise with the New Panama Canal Company upon all legal questions which might arise relating:

First. To the determination of the price and conditions to be proposed to the eventual purchaser of the concession and the canal works and all the assets of the new company.

Second. To the division between the new company and the liquidation of the proceeds of the sale, in case that sale be effected.

That the arbitrators have decided:

First. That the liquidator of the Universal Interoceanic Canal Company of Panama should, before the final division, take out of the price of the sale of the enterprise to the United States Government, the sum of 20,000,000 francs.

Second. That after this sum has been taken out, the New Panama Canal Company should, for its part, take out the sum of 5,000,000 francs.

Third. That the balance of the said sum should be divided between the parties entitled in the proportion of 60 per cent thereof for the liquidator of the Universal Interoceanic Canal Company of Panama and of 40 per cent thereof for the New Panama Canal Company.

That the liquidator, as well as M. Lemarquais, the legal representative of the bondholders, has received a certain number of notifications and oppositions to the sale emanating from opponents to the proposed transfer to the United States Government.

That at this time the new company (in view of the position assumed by the opponents of the Panama Canal enterprise, and of the objections raised by them), requests the liquidator to petition for the approval by the court under the provision of the law dated July 1, 1893, and so far as the liquidation is concerned, of the agreement entered into between the new company and the liquidator for the sale to the Government of the United States of America, of the whole of the property of the corporation on the Isthmus, as well as the maps and records in Paris, for the sum of \$40,000,000 (about 205,000,000 francs), and subject to modifications to be procured from the Government of Colombia as to articles 21 and 22 of the concessionary contract.

That the liquidation of the old Panama Canal Company is therefore directly interested in the proposed transfer, since the larger portion of the eventual proceeds of the sale will be turned over to it.

That under article 10 of the act of July 1, 1893, all acts tending to alienate any assets of the old company, all contracts entailing a transfer or contribution of the whole or a part of the assets of the old concern, emanating from the liquidator of the Universal Interoceanic Canal Company of Panama, shall be subject to the approval of the civil tribunal of the Seine, which shall, upon the report of one of the justices, pass on the question in open court.

Now, therefore, your said petitioner in his official capacity respectfully requests and begs that it please the honorable president and justices of this court to approve so far as the liquidation of the Universal Interoceanic Canal Company of Panama is concerned, the offer made by the New Panama Canal Company with the assent of the liquidator, to the Government of the United States of America, to transfer to said Government all rights and property owned by the new company on the Isthmus of Panama as well as its maps and records in Paris for the sum of \$40,000,000 (i. e., about 205,000,000 francs), said offer to remain in force until March 8, 1903, and the eventual proceeds of the sale to be divided according to the award made by the arbitrators, subject, however, to the modification to be secured from the Government of the Republic of Colombia, as to articles 21 and 22 of the concessionary contract.

And to order that their decree shall be published according to act of July 1, 1893.

Under all reservations; and it will be justice.

(Signed)

DE BIEVILLE.

In view of the documents exhibited, namely:

The order issued by the president of the court, dated March 18, 1902, appended to said petition, directing "that the petition be communicated to the attorney for the Republic, and that M. Le Berquier, justice, is hereby appointed to make a report. Done at the palace of justice, Paris, March 18, 1902, and signed Ditte."

The conclusions of the attorney for the Republic likewise appended to said petition, which are as follows: "The attorney for the Republic does not object. Rendered in the attorney's office March 18, 1902. Signed Pezous."

Articles 10 and 11 of the act of July 1, 1893.

And having heard Justice Le Berquier in his report and Mr. Rome, deputy attorney for the Republic in his conclusions;

And after having deliberated in conformity with the law, judging in first resort;

Whereas, under article 10, of the act of July 1, 1893, all acts of realization of assets, all contracts entailing a transfer or contribution of the whole or of part of the assets of the concern, emanating from the liquidator of the Universal Interoceanic Canal Company shall be subject to the approval by the civil tribunal of the Seine;

Whereas Gautron, in his capacity of liquidator of the Universal Panama Canal Company, prays that the court confirm, as far as the liquidation is concerned, the offer made by the New Panama Canal Company, with his own assent to the United States Government to transfer to the latter all its rights and property as well as its maps and records in Paris, for the sum of \$40,000,000;

Whereas it appears from the documents in the case that such request should be granted;

For these reasons:

Confirms, so far as the liquidation of the Universal Interoceanic Panama Canal Company is concerned, the offer made by the New Panama Canal Company, with the assent of the liquidator to the United States Government, to transfer to said Government the whole of the property and rights owned by the New Panama Canal Company on the Isthmus of Panama, as well as its maps and records in Paris, for the sum of \$40,000,000 (i. e., about 205,000,000 francs), said offer to remain in force until March 4, 1903, the actual proceeds of the sale to be divided according to the award made by the arbitrators, subject to the modification to be secured from the Government of the Republic of Colombia as to articles 21 and 22 of the concessionary contract.

Orders this decree to be published according to the act of July 1, 1893.

(Signed)

DITTE and BARUÉ.

Done and decreed by Messrs. Ditte, president; Monier, vice-president; Le Berquier, judge; in the presence of Messrs. Chauvin and Planchenault, special judges; Rome, substitute for the attorney for the Republic, assisted by Barué, clerk, on Wednesday, March 19, 1902.

In consequence of the above, the President of the Republic of France

instructs and directs all sheriffs, when requested, to enforce the above decree, attorneys-general and the attorneys for the Republic in the courts of first instance to give them assistance, and all commanders and officers of the public force to give them the aid of arms when legally requested.

In witness whereof the minute of this decree was signed by the president and the clerk.

Recorded at Paris April 2, 1902, folio 86, division 11. Received 9 francs 38 centimes.

(Signed)

BARTOSZEWSKI.

By the court:

(Signed)

FLOQUET.

---

EXHIBIT 5.

JUDGMENT OF JULY 3, 1902 (CIVIL TRIBUNAL OF THE SEINE), DECIDING AGAINST DONNADIEU, THE BONDHOLDER, ON TIERCE OPPOSITION.

[No. 1. Taken from the minutes of the clerk's office of the civil tribunal of first instance of the department of the Seine, sitting in the palace of justice at Paris.]

GAUTRON versus DONNADIEU.	}	First chamber, first section. 3d July, 1902.
---------------------------------	---	--

The civil tribunal of first instance of the department of the Seine, sitting in the palace of justice at Paris, has rendered in public session of the first chamber of that tribunal the following judgment:

Session of Thursday, the 3d of July, 1902.

Between M. Gautron, liquidator of the Universal Company of the Interoceanic Canal of Panama, residing at the headquarters of the said company in liquidation, 42 rue Chaussée d'Antin, defendant in *terce opposition*, appearing, submitting brief and arguing by Me. Thiéblin, advocate, assisted by Me. de Bieville, solicitor, on one part,

And, first, the New Panama Company, an anonymous company, having its headquarters at Paris, rue Louis le Grand No. 7, acting through its president and the members of its council of administration, plaintiff, appearing and filing a brief by Me. Dubourg, solicitor,

Second. M. Emmanuel Donnadiou, proprietor, residing at Chateau de Blomac (Aude), *tiers opposant*, defendant, appearing and submitting brief by Me. Caillet, solicitor,

Third. M. Lemarquis, residing at Paris, 3 rue Louis le Grand, acting in his own name and as mandataire of the bondholders of the company of the Interoceanic Canal of Panama, intervenor, appearing and submitting brief by Me. Charneau, solicitor, on the other part; without their said present characters being able to prejudice in any manner the rights and respective interests of the parties.

## POINTS OF FACT.

1. *Tierce opposition.*—M. Donnadiou claiming that he was a creditor of the company in liquidation of the Inter-oceanic Canal of Panama, for a principal sum of 135,624 francs 99 centimes, and the interest on said sum, by virtue of a judgment of this tribunal of January 25, 1893, confirmed by a decree of the court of Paris of June 29, 1893, both recorded; that the liquidator of the Panama Canal Company had contributed to an anonymous company called the New Panama Canal Company, in June, 1894, by agreements approved by judgments recorded here June 29 and August 8, 1894, the concession of the canal, the works executed on the Isthmus, the *materiel*, the plans and drawings, the rights of the company in liquidation as to the Panama Railroad, etc., for the price of 60 per cent of the profits to arise from carrying on the canal; that the new company had, in January, 1902, made an offer to sell to the Government of the United States of America for \$40,000,000, the totality of its properties and rights on the Isthmus and its plans and archives, that is to say, what the liquidator had contributed; that M. Gautron as liquidator had given his consent to that offer and had asked the approval of it by the tribunal, which had been accorded by judgment of March 19, 1902, in conformity with the law of July 1, 1893; that according to the provisions of article 11 of the said law M. Donnadiou had a right to attack by tierce opposition that judgment of approval and that he intended to make use by the present proceeding of that right; that in effect there were submitted to the approval of the tribunal by article 10 of the law of July 1, 1893, all acts in realization of assets, all contracts carrying a cession or contribution of the whole or part of the company's assets, proceeding from the liquidator of the Universal Company of the Inter-oceanic Canal of Panama; that the offer made to the Government of the United States did not emanate from the liquidator of the Universal Company, but from the new company; that it did not carry and will not carry a cession of the assets of the Universal Company in liquidation, since the properties offered had already been ceded by the liquidation of [to?] the new company by the approved contribution made to it by the liquidation in June, 1894; that in considering as a cession of part of the assets of the company in liquidation the consent given by the liquidator to the offer made by the new company, an assent which constituted undoubtedly the abandonment of important rights, the approval thereof could only be asked and obtained after agreement made between the new company and the liquidator to regulate the conditions of that cession and fix the price of the compensation for the rights ceded; that such an agreement, which would itself be a subject for approval, did not appear to exist; that, in any case, it was not such an agreement which had been approved; that such an agreement was not examined at the time of the judgment of March 19, 1902, and could not be, as was intended by the law of July 1, 1893 (Art. II), discussed before the tribunal by the creditors of the liquidation; that, consequently, there was no subject-matter for approval and the judg-

ment of 19 March, 1902, should be set aside; that, on the merits, as an additional point, the tribunal should not have approved the offer of the cession which the new company was without power to make; that, indeed, the new company, an anonymous company and a moral person had life and power only within the limits of its by-laws and had not the power to carry on operations not comprised within the objects of the company; that article 20 of the by-laws of the new company limits the objects of the company to the construction and carrying on of the canal and its accessories; that consequently the company had not the right to sell what it was its business to carry on, to perform an act which not only was outside of its object, but even rendered it unable to carry out that object; that the assent of the liquidator could not give it power in this respect; that the power of the company depended on its by-laws, and that the company could not alter them, and in that way acquire the power which it lacked; the general law and the company compact itself (art. 60) forbade the alteration of its object in its essence, a fortiori the suppression of it; considering also, and as an additional point, if the company had the power, it had not the right to sell the canal; that, indeed, this canal and its accessories had been contributed to it by the liquidation in exchange, especially, for the granting to it of 60 per cent of the profits to arise from carrying on the canal; that the new company could not, consequently, suppress the remuneration promised by it to the contributor by suppressing the source of the benefits to be divided and by replacing them with the price of the sale, over which the by-laws did not give any right to the contributor.

Considering that the disposing part of the judgment of the 19th of March, 1902, in saying that the ultimate price of the cession should be divided conformably to the decision of the arbitrators, left it to be understood that this question had been submitted to a tribunal of arbitration, but that there was in this a violation of article 3 of the law of the 1st of July, 1893, which provides that all acts proceeding from the liquidator should be placed before the civil tribunal of the Seine, and that the tribunal ought not indirectly to sanction by its judgment this violation of law.

Considering that the plaintiff was a creditor of the liquidation of the Universal Company, which had contributed the canal to the new company; that he was interested in maintaining the conditions of that contribution, which was made in his interest and had been made in conformity with the law of July 1, 1893, passed to protect him; that, after a judgment of approval designed to protect his rights, he was, accordingly, justified in requiring respect for the by-laws, which were the guarantee of third persons, as well as the rule for the associates, the execution of the contract of contribution and obedience to the law; that he had then a right to oppose the approval of a combination which violated at once the by-laws, the contract, and the law.

Considering, on the other hand, that it is proper to remark that the new company after having proclaimed and caused to be established by

the most eminent engineers the possibility of constructing the canal and of obtaining profit from it, had never made the least effort to accomplish its work; that it appeared never to have thought of anything but to assure to its stockholders the reimbursement of their shares, and the sale to the United States was not undertaken by it except because it wished to procure, not only that reimbursement, but also very important profits; that such a result would not be reached except by a sacrifice of the creditors of the liquidation reduced to the receipt of an insignificant dividend for the benefit of financiers who, it should not be forgotten, had paid up the shares of the new company which they held, not with their own funds, but with those which they had improperly received from the new (?) company and which the courts had condemned them to reimburse; that this enrichment of themselves to the detriment of the liquidation would, besides, be obtained at the price of the abandonment of an undertaking rightly called national; that thus, then, and from all points of view, there should not have been an approval.

Done by document of Thiellement, bailiff at Paris, dated April 23, 1902; to make summons on M. Gautron, as liquidator above mentioned, to appear within eighteen full days, as by law allowed, and through the aid of the solicitor constituted duly before the president and judges composing the civil tribunal of the Seine sitting at the palace of justice of Paris at 11 o'clock in the morning, in order, for the reasons above given:

[Asks of the tribunal] to have M. Donnadiou admitted as tiers opposant to the judgment of the 19th of March, 1902, to declare that the offer made by the Universal Company (sic) to the Government of the United States of America was not susceptible of approval according to the provisions of article 10 of the law of July 1, 1902; as an additional point on the merits, to declare that the ultimate cession of the canal by the new company was beyond the powers of that company; to declare that the cession offered violated the by-laws of the new company and the rights which belonged to the liquidation of the Universal Company in consequence of its contribution; to declare that the liquidator had not been and was not able to carry a matter tending to cause his rights to be respected before any other tribunal than the civil tribunal of the Seine, especially before the tribunal of arbitration; to declare that the cession offered was contrary to the rights and the interests of the creditors of the liquidation of the Universal Company of the Interoceanic Canal of Panama. Consequently, to declare, as a matter of law and on the merits, that there should not have been the approval, asked for by Gautron as liquidator so far as concerns the liquidation of the Universal Company, of the offer made by the new Panama Canal Company, with his assent, to the Government of the United States of America, of all the property and rights on the Isthmus of Panama, together with the plans and archives of Paris for \$40,000,000. Consequently, to set aside purely and simply the judgment of March 19, 1902, to which the tierce opposition was made; and to condemn M. Gautron as liquidator in the costs. Upon this summons, which contained the constitution of M. Caillet,



solicitor for M. Donnadieu, M. de Biéville was constituted solicitor for M. Gautron as liquidator by act done at the palace on the 28th of April, 1902.

II. The demand of release from the prohibitions against the sale of the Panama Canal.

The New Panama Canal Company claims that according to the act done out of court, through Thiellement, bailiff of Paris, dated the 18th of February, 1902, appearing by copy, M. Donnadieu had made prohibition to the plaintiff company to proceed with the sale of the canal of Panama, of the concession, and of its accessories, with the declaration that, in default of the said company's acceding to this prohibition, he would proceed by all legal means as well against it as against the proper public authorities of the United States of North America, to have established adjudged and sanctioned the invalidity of the proposed sale; that, on the other hand, according to another act done out of the court through the instrumentality of the same bailiff, dated February 2, 1902, served upon the ambassador of the United States as representative of the Government of the United States of North America, as appears from the notification made to the plaintiff by copy of the said document, through Thiellement, bailiff, dated the 26th of February, 1902, appearing by copy, the said M. Donnadieu declared that he opposed the cession of the canal of Panama, declaring that if, notwithstanding his protestation, agreements concerning that cession were concluded, he would contend for their invalidity, and would proceed before all competent jurisdictions to have such invalidity adjudged and sanctioned; that, moreover, by the terms of the aforesaid notification made to the plaintiff company by document of Thiellement, bailiff of Paris, of the 26th of February, 1902, M. Donnadieu declared that he summoned the administrators of the New Panama Canal Company to bring to the knowledge of the stockholders of the said company in the general meeting convoked to deliberate on the project of the cession of the canal to the United States, his protestation and the document above mentioned, served at his request by M. Thiellement, bailiff of Paris, on the 18th of February, 1902; that by the notification addressed to the ambassador of the United States, M. Donnadieu caused, without right, grave prejudice to the new company by paralyzing the ultimate exercise of an indisputable right; that the reasons given by M. Donnadieu do not bear examination; in the first place, M. Donnadieu, in his pretended character as creditor of the liquidation of the Universal Company of the Panama Canal, could not allege the existence of any legal tie between him and the New Panama Canal Company, which is not his debtor, of which he is not a bondholder; that the defendant has not, then, any character authorizing him to invoke either the by-laws of the New Panama Canal Company under the general principles of law in order to interfere in the carrying on of the company and to interpose himself between the plaintiff company and third persons with whom it may have occasion to carry on business, nor any character authorizing him to invoke the agreement which took place between the new company

about to be formed and the liquidation of the Universal Company based upon the indebtedness of the latter to him, except on condition of establishing that the liquidation was not (sic) injuring the rights derived by it from this agreement; that the contrary was demonstrated by the agreement between the two companies, which agreement was sanctioned by a judgment rendered in the chamber of the council of the civil tribunal of the Seine the 19th of March, 1902, duly recorded, binding on him in conformity with the law of July 1, 1893; considering, moreover, and as an additional point on the merits, that the by-laws of a company, in the part which determines the object of the company, are not and can not be in contradiction to a decision of the general meeting which puts an end by alienation to that object; that by such a decision the general meeting did not transgress or modify the company compact; that, on the other hand, the contributor of property in kind to a company about to be formed, the author of stipulations relative to that contribution, remained the sole judge of the consequences which the alienation by the company of the property contributed might carry with it, as affecting the original stipulations; that, in the present case, the consent of the liquidator of the Universal Company having been obtained and approved by judgment, which gave him power as has been said above, no one of those interested in whatever way in the said liquidation could be admitted to criticise or contradict that assent, except under the conditions and within the time and according to the forms provided by the law of the 1st of July, 1893; that M. Donnadien, in contempt of those provisions, had committed an act of unjustifiable aggression against the new company by the notification of the 26th of February, 1902, to the ambassador of the United States; that this proceeding was purely vexatious; that it had caused and would cause hereafter a very grave prejudice to the company; that this aggression should be severely condemned and reparation ordered commensurate with the injury. Done by document of Viequet, bailiff at Paris, dated the 25th of April, 1902, duly recorded, notifying to M. Emanuel Donnadien, proprietor above named, and summoning him to appear within eight full days and the additional time allowed for distance, and by the instrumentality of the solicitor constituted before the president and the judges composing the civil tribunal of the Seine sitting in the palace of justice at Paris, at 11 o'clock of the morning, for the reasons above stated [asks the tribunal]: to have it declared and adjudged that M. Donnadien was without character authorizing him to serve the Government of the United States in the person of its ambassador at Paris with the document of the 26th of February, 1902; to have it declared and adjudged in addition that M. Donnadien was without just grounds for the said act; to have a release, purely and simply, as far as may be necessary, from the prohibitions contained in the said document as well as in two other documents served upon the New Panama Canal Company, one dated the 18th and the other the 26th of February, 1902; to declare them null and void and of no effect; to have M. Donnadien condemned to make reparation for the injury done, upon a statement of

the damages to be hereafter furnished; to have him condemned to the payment of 10,000 francs provisionally; to have M. Donnadien condemned in all the costs. On this summons, which contains the constitution of Me. Dubourg as solicitor of the plaintiff company, Me. Caillet, solicitor, was constituted for M. Donnadien by act done at the palace on the 3d of May, 1902. By instrumentality of Me. Dubourg, a record was drawn up and the cause inscribed on the general roll of the clerk's office, was distributed to this chamber, before which Me. Dubourg gave notice to Me. Caillet, solicitor of M. Donnadien, by a document of the palace, dated the 19th June, 1902, for the audience of Wednesday, 11th of June, 1902. At this audience Me. Caillet submitted a brief as to the exceptions taken and afterwards a brief on the merits, whereupon the matter was placed on the roll of this chamber.

III. The joining of the causes and the intervention of M. Lemarquis as mandataire.

Me. Caillet, solicitor of M. Donnadien, not following up the tierce opposition, M. De Biéville, by document of the palace dated 7th of June, 1902, served upon Me. Caillet and Dubourg a brief asking that it might please the tribunal:

Considering that the judgment rendered in the first chamber of the civil tribunal of the Seine the 19th of March, 1902, approved, as far as concerned the liquidation of the Universal Company of the Inter-oceanic Canal, of Panama, the offer made by the new company, with the assent of the liquidator, to the Government of the United States of America to cede to the said Government all the properties and rights belonging to the new company on the Isthmus of Panama, as well as the plans and archives at Paris, for the price of \$40,000,000 (205,000,000 francs or thereabouts), the said offer to remain good up to the 4th of March, 1903, the ultimate price of the cession to be divided conformably to the decision of the arbitrators and with the reservation of alterations to be obtained from the Government of the Republic of Colombia so far as concerns articles 21 and 22 of the contract of concession; considering that this judgment was published conformably to the law of the 1st July, 1893; considering that M. Emmanuel Donnadien, calling himself a creditor of the new company of the Interoceanic Canal of Panama, entered tierce opposition to the judgment; that he asked of the tribunal to declare formally that the offer made by the new company to the Government of the United States was not susceptible of approval according to the terms of article 10 of the law of July 1, 1893; that he asked, additionally, a declaration of the invalidity of the ultimate cession of the canal by the new company as beyond the powers of that company and made in violation of the by-laws of the new company, of the rights which belong to the liquidator; that, consequently, he demanded of the tribunal to set aside purely and simply the judgment of the 19th March, 1902, attacked by tierce opposition; but, considering that M. Donnadien was a creditor of the liquidation of the Universal Company of the Interoceanic Canal of Panama in the character of a subscriber to or holder of bonds; considering that the right to enter

tierce opposition to the judgment rendered in conformity with article 10 of the law of July 1, 1893, did not belong to him; that article 10 of the said law provided that every judgment of approval should be published, and that it could be attacked by tierce opposition within a month from the publication, by the stockholders, by the mandataire of the bondholders, and by the other company creditors; that thus the holders of the bonds were excluded from the right of entering tierce opposition; that this is reserved in the general interest to their mandataire; considering that M. Lemarquis, acting under responsibility and under the control of the tribunal, has entered no tierce opposition to the judgment of the 19th of March, 1902; that under these circumstances tierce opposition was closed to the bondholders represented by their mandataire; considering that, on the other hand, no other tierce opposition was entered to the said judgment either on the part of the stockholders or on the part of the company's creditors; that, under these circumstances the judgment of the 19th of March, 1902, regularly published, became definitive; for these reasons [asks the tribunal] to declare M. Donnadieu, in his character of subscriber to or holder of bonds of the Universal Company of the Interoceanic Canal of Panama, inadmissible to make tierce opposition to the judgment of the 19th of March, 1902, and to condemn him to the costs, out of which to be allowed the fees of Me. De Biéville, solicitor.

By the instrumentality of Me. de Biéville this brief was submitted, and, after being noted at the clerk's office, was deposited in this chamber, before which Me. de Biéville gave notice to Me. Caillet, by document of the palace dated the 11th June, 1902, for the audience of Wednesday, the 18th of June. At that audience Me. Caillet submitted a brief on the exceptions and a brief on the merits, whereupon the matter was put on the roll of the chamber. By document of the palace of the 23d of June, 1902, Master Caillet served on Me. de Biéville, solicitor, a brief asking that it might please the tribunal:

Considering that the liquidator of the company of the Interoceanic Canal of Panama only opposed the tierce opposition entered by M. Donnadieu to the judgment of approval of the 19th March, 1902, by an objection of inadmissibility; that he claimed that M. Donnadieu was a bondholder and had not, in that character, the right to enter tierce opposition; that the exercise of this right and of all others belonged only to the mandataire whom the law imposed upon the holders of bonds; that he added that M. Lemarquis not having made use of the right of tierce opposition, the judgment of the 19th March, 1902, became definitive; but, considering that M. Gautron, as liquidator, commits, in these propositions, the double error of fact and of law; considering, as a matter of fact, that M. Donnadieu was not a bondholder; that by judgment of the civil tribunal of the Seine of the 25th of January, 1893, confirmed by the decree of the court of Paris of the 29th of June, 1893, the contract of loan as between M. Donnadieu, of the Panama Canal Company, had been rescinded as against the borrowing company, which had been condemned to the reimbursement of the sums due from

it in consequence of that rescission; that M. Donnadieu was not, therefore, a holder of bonds, voided representatives of a canceled contract, but a creditor by virtue of the judgment and decree above referred to; that he has, then, remained master of his rights and was not represented as to the exercise of them by a legal mandataire of the holders of bonds; that, moreover, even had M. Donnadieu remained a holder of bonds (which he has not), he would not less have the right to enter tierce opposition; that the law of July 1, 1893, article 2, provides that every bondholder shall have the right to institute individually and at his risk and perils any suit which the mandataire shall have refused or neglected to institute within a month following the notification to him to proceed; that by document of the 19th of February, 1902, M. Donnadieu, after having notified M. Lemarquais of the prohibition which he had caused to be served upon the New Panama Canal Company against selling the canal and its concession, had summoned the said Lemarquais to take all useful measures to prevent the consummation of the projected sale, declaring to him that, in default of his opposing the proposed sale and even in concurrence with him, M. Donnadieu intended, by all legal means, by all useful proceedings, to oppose the said sale; that, consequently, and even if (which is not so) M. Donnadieu was represented by M. Lemarquais, he would have the right to make use, in default of his having done so after being notified to proceed, of the right of action contemplated and provided for by the law of July 1, 1893, in the case provided for by articles 10 and 11 of the said law, and which, in the present instance, tended to prevent the projected sale of the canal to the United States of North America; that, consequently, the tierce opposition of M. Donnadieu, from whatever point of view regarded, was admissible; that the objection of inadmissibility made by the liquidator should be rejected; considering that the judgment of approval of the 19th of March, 1902, to which tierce opposition was made, was rendered upon the consideration of the decision of the arbitrators which fixed the manner of division of the price of the canal, a decision which the judgment contemplates in its disposing part; considering that this decision should be turned over to the discussions upon the tierce opposition, for the reason that it was communicated to the tribunal in support of the request for approval; that it presented, moreover, a capital point of interest with regard to the decision to be arrived at, the interest of the creditors to accept or reject the proposed cession depending in great part on the profit which might result for them and especially on the proportion of the price which would be reserved to them; considering, however, that, notwithstanding all friendly efforts and especially a summons dated the 20th of June, 1902, M. Gautron, as liquidator, refused to communicate to M. Donnadieu that decision of the arbitrators; that he should have been compelled to make that indispensable communication; for these reasons [asks the tribunal] to declare Gautron as liquidator without just grounds for his point of inadmissibility; to declare the tierce opposition admissible, and, before proceeding to the merits, to declare that upon the day for the judgment to be rendered Gautron as liquidator

shall be bound to communicate to M. Donnadiou in due form the decision of the arbitrators adduced by him in support of his request for approval and considered in the disposing part of the judgment of the 19th March, 1902, to which the tierce opposition has been made, on pain of 500 francs per day for delay, after which a decision to be rendered; to declare that, until such communication shall have been made, a hearing should be refused to said Gautron as liquidator; and to condemn him in the costs of that incidental proceeding, with the fees of Me. Caillet, solicitor. By document of the palace of justice dated the 25th June, 1902, Me. Caillet served on Me. Dubourg, solicitor, a brief asking that it might please the tribunal:

Considering that the New Panama Canal Company desired to have it adjudged that M. Donnadiou was, first, without character or standing; second, without legal right to make opposition to the sale of the canal to the United States; that it contends that the notifications, protests, and prohibitions made on his request constituted acts of unjustifiable vexatious aggression, that had caused an injury for which it demanded reparation; considering that M. Donnadiou acted in virtue at once of his right which was personal to him, and by way of exercising the rights of the liquidation of the Universal Company, his debtor.

SMC. I. Considering that the by-laws of anonymous companies were not made merely to regulate the rules of the associates among themselves; that they are also the law of the company with regard to third persons; that the publicity required for by-laws has no other *raison d'être*; considering that, on the other hand, anonymous companies, associations of capitals, excluding all notion of persons, have no active life or power except within the limits and within the objects which the by-laws creating them determine; that outside of those limits an anonymous company has no existence or power, and the acts which it concludes are radically void; that this voidness is absolute and can be invoked by anyone interested who has the character or standing to do this by the mere fact of his interest; that Donnadiou had, consequently, the character to ask to have pronounced the invalidity of the sale of the canal consented to by the new company, because that sale deprived him of 60 per cent of the profits of carrying on that canal reserved to the creditors of the Universal Company; that he had a character to protest against the project of such a cession, to oppose its realization; considering that the new company recognized that, in principle, Donnadiou was admissible to make use on behalf of the Universal Company, his debtor, of the right of action which the latter derived from its contribution, but that it contended that, in fact, he was not in a position to make use of it, the liquidator having made use of that right of action in consenting to the cession of the canal; but considering that Gautron as liquidator, far from having made use of the rights given him by the stipulations concerning his contributions, had, on the contrary, abandoned them in consenting to the cession of the canal; that, consequently, Donnadiou was undoubtedly admissible to exercise the

neglected rights; considering that it remains to be shown that Donnadiou had just grounds for instituting his two proceedings.

SEC. II. Considering that the new company recognized that its object was to carry on and not to sell the canal, but that it contended that it had nevertheless the right to sell because the sale put an end to the object of the company, and therefore did not entail any modification of that object; but considering that this is a mere juggling with words; that the company had power and capacity only to carry out its object; that is to say, to construct and carry on the canal; that it had none to take a profit out of selling it; that the sale was possible only after a regular dissolution of the company, by an act of liquidation and in realization of the assets, but that the stipulations concerning the conditions of the contribution of the canal had not permitted, and did not permit, the company to dissolve itself and to abandon, in the actual state of affairs, the construction of the canal, to the detriment of the contributor and of those in privity with him; that the sale was, therefore, impossible and did not come within the powers of administration and of disposition belonging to the company life.

SEC. III. Considering that, in violating the stipulations concerning the contribution of the canal, and injuring the rights of the contributor and of his creditors, which the new company does not even attempt to deny or to explain away, it seeks only to take refuge behind the exception of inadmissibility drawn from the judgment of approval of the 19th of March, 1902, and from the law of July 1, 1893; but considering that the judgment of the 19th of March, 1902, was rendered only after the notifications which are here criticised of the 18th, 19th, and 26th of February, 1902; that it could not then diminish or suppress the rights which M. Donnadiou had to make those notifications; considering, on the other hand, that the approval contemplated by the law of July 1, 1893, providing solely for the case of a cession consented to by the liquidator of the whole or a part of the assets of the liquidation, can not govern a contract which is only to take place between the United States and the new company, nor allow to the latter or the liquidation, with which there was no contract of alienation of assets, advantages made for the benefit of its creditors; that Donnadiou who had, besides, attacked the judgment of the 19th of March, 1902, by tierce opposition had therefore just grounds to make use of the right of action which the liquidator deserted and to attack at need, by virtue of article 1167 of the Civil Code, the gratuitous abandonment consented to by the liquidator of the advantages which constitute almost the only important assets coming to the creditors. For these reasons [asks the tribunal] to declare that in making the notifications which have been criticised M. Donnadiou was only making use of his rights; to declare that M. Donnadiou was personally admissible to take advantage of the lack of power in the new company to cede the canal; to declare that M. Donnadiou was admissible, by the terms of article 1166 of the Civil Code, to make use of the rights neglected by the liquidator, his debtor; to declare that he is also admissible to attack, by virtue of

article 1167 of the same code, the abandonment of his rights, by his debtor; consequently to declare that the new company, constituted to construct and carry on the canal is without power to dispose of it by alienation; to declare, consequently, null and void the offer of cession proposed to the United States of North America; to declare that the new company is without right to free itself from the price due from it by reason of the contribution of the canal by selling the canal to a third person who would obtain all the benefits of it; to declare, from this new point of view, the offer of cession of the canal null and void; to reject all the requests, points and arguments of the new company, and to condemn it in all the costs, allowance therefrom to be made of the fees of Me. Caillet, solicitor. By document of the Palace of the 25th of June, 1902, Me. Charneau served on Me. Caillet and Me. De Bieville a brief as to intervention, in which he constituted himself as representative of M. Lemarquis, mandataire, and asking that it should please the tribunal:

Considering that Lemarquis, as mandataire of the Panama bondholders, properly intervenes in the pending case between M. Gautron as liquidator and M. Donnadiou; considering that the cession proposed to the United States of North America, to which M. Gautron has consented, is favorable to the interests of the bondholders, for these reasons [asks the tribunal] to admit M. Charneau as solicitor for M. Lemarquis as mandataire; to admit *M. Lemarquis' intervention in joining in with the conclusions submitted by the liquidator and in approving fully the understanding entered into between the liquidator and the New Panama Company with the object of making a cession of the enterprise to the Government of North America for the sum of \$40,000,000, and to allow the costs of suit as may be proper.*

By document of the Palace dated June 28, 1902, M. Caillet served on MM. Charneau and de Biéville a brief, asking that it might please the tribunal:

As to the intervention of M. Lemarquis, considering that M. Lemarquis justifies his intervention upon this single ground, quoting his own words, "Considering that the proposed sale to the American Government, to which M. Gautron has assented, is favorable to the interests of the bondholders;" considering that the tribunal, in order to decide concerning the admissibility of this intervention, ought to examine the interests on which is founded the intervention; that in this case that interest, as M. Lemarquis says, proceeds from the advantage of the proposed cession; that the tribunal then finds itself forcibly called upon to examine if the proposed cession is or not favorable to the bondholders and all other creditors, such as M. Donnadiou; that this examination requires the production of the papers concerning the said cession, and consequently the communication to the parties in papers which the tribunal saw before rendering the judgment of approval of the 19th of March, 1902; papers with which M. Lemarquis was, of course, acquainted, but the communication of which to M. Donnadiou was refused. For these reasons before reaching a decision, either with regard to the



admissibility, or on the merits, of the intervention of M. Lemarquis [asks the tribunal] to declare that the papers concerning the proposed cession of the canal and the approval given by Messrs. Gautron and Lemarquis to that cession, especially the arbitration decision considered in the disposing part of the judgment of March 19, 1902, shall be in legal form communicated to M. Donnadieu, and this on pain as against Messrs. Gautron and Lemarquis of constraint by a fine of 500 francs per day of delay, during a month, after which judgment to be rendered; and to condemn them in solido to the costs, allowing therefrom the fees of Me. Cailliet, solicitor. After several postponements the cause has come on to be heard at the session of this day. At this audience the advocates of the parties, assisted by their solicitors, have presented themselves at the bar, have restated and enlarged upon the points previously submitted by them, and have asked judgment for their respective clients. The public attorney has been heard as to his views. In this state of the matter, the cause presents for adjudication the following questions:

POINTS OF LAW.

AS TO THE TIERCE OPPOSITION.

Should the tribunal admit M. Donnadieu as tiers opposant to the judgment of the 19th of March, 1902? Doing so, should it declare formally that the offer made by the new company to the Government of the United States of America was not susceptible of approval under the terms of article 10, of the law of July 1, 1893?

As a subsidiary matter, on the merits, should it declare that the ultimate cession by the new company is beyond the powers of that company; declare that the cession offered violates the by-laws of the new company and the rights belonging to the liquidation? Should it declare that the liquidator had not been and was not able to make use of a proceeding tending to secure respect for his rights before any other tribunal than the civil tribunal of the Seine, and especially before an arbitration tribunal? Should it declare that the cession offered was contrary to the rights and to the interests of the creditors of the liquidation of the Universal Company of the Interoceanic Canal of Panama?

Should it say, consequently, that there was no warrant, either as to form or on the merits, for the approval asked by Gautron as administrator so far as concerns the liquidation of the said Universal Company of the offer made by the Universal Company of the Panama Canal, with his consent, to the Government of the United States of America, of all its property and rights on the Isthmus of Panama, as well as the plans and archives at Paris, at the price of \$40,000,000?

Should it, consequently, set aside purely and simply the judgment of the 19th of March, 1902, to which tierce opposition was made?

Should it, on the contrary, declare Donnadieu, in his character of subscriber to or holder of bonds of the Universal Company of the Interoceanic Canal of Panama, inadmissible to make tierce opposition to the judgment of March 19, 1902?

As to the demand for release from prohibitions to the sale of the Panama Canal, should the tribunal declare and adjudge that M. Donnadiu was without character or standing to serve on the Government of the United States, in the person of its ambassador at Paris, the documents of the 26th of February (sic), 1902?

Should it declare and adjudge, additionally, that M. Donnadiu was unfounded in the legal grounds alleged for that act?

Should it order a release, pure and simple, so far as necessary, from the prohibitions contained in the said document and in two others served upon the New Panama Canal Company, one dated the 18th and the other the 26th of February, 1902?

Should it declare them null and of no effect? Should it condemn M. Donnadiu to repair the injury caused, upon a statement of the damages to be afterwards furnished?

Should it condemn him to the payment of 10,000 francs provisionally?

Should it, on the contrary, declare the New Panama Canal Company inadmissible and unfounded in its demand, and reject it?

As to the intervention of M. Lemarquis as mandataire: Should it pronounce admissible that intervention as to his joining in the request of the liquidator, as to his approving in all respects the arrangement between the liquidator and the New Panama Canal Company with a view to the cession to the Government of the United States for the sum of \$40,000,000?

Should it, on the contrary, before proceeding to judgment as to the admissibility or merits of the intervention of M. Lemarquis, declare that the papers concerning the proposed cession of the canal and the approval given by Messrs. Gautron and Lemarquis to that affair, especially the award of the arbitrators, considered in the disposing part of the judgment of March 19, 1902, shall be, in legal form, communicated to M. Donnadiu, and this on pain as against Messrs. Gautron and Lemarquis in solido of 500 francs per day of delay during a month, after which judgment to be rendered? What as to costs? Record of the case as drawn up and signed by De Biéville.

The tribunal having heard, as to their points and arguments, Gontard, advocate, assisted by Dubourg, solicitor, of the New Panama Canal Company, acting through its president and the members of the council of administration; Derche, advocate, assisted by Caillet, solicitor of Emmanuel Donnadiu; Henri Thiéblin, advocate, assisted by De Biéville, solicitor of Gautron, as liquidator; Charneau, solicitor of Lemarquis as mandataire; the public attorney having been heard, and after having deliberated according to law, judging in ordinary matter and in first resort, the causes being united on account of the connection between them, and pronouncing by one and the same judgment:

1. *As to the intervention of Lemarquis.*—Considering that Lemarquis, mandataire of the bondholders of the Panama Canal, is admissible to intervene in the present proceeding according to the terms of article 11 of the law of July 1, 1893.

2. *As to the tierce opposition of Donnadiou to the judgment of this chamber of March 19, 1902.*—Considering that by the terms of articles 10 and 11 of the law of July 1, 1893, a judgment of approval, such as that of March 19, 1902, can be attacked by tierce opposition only by the persons enumerated in the latter of the said articles; that is to say, by the stockholders of the Universal Company of the Panama Canal, by the mandataire of the bondholders, and by the other company creditors of the same company, whence it follows that the bondholders are not admissible to make tierce opposition to the said judgment; that this inadmissibility results at the same time from the text of article 11, above mentioned, and from considering together that article and article 2, paragraph 4; that, on one hand, by the terms of article 11, tierce opposition is to be put in within not to exceed a month from the publication of the judgment, and, on the other hand, article 2, paragraph 4, only permits to the bondholder who wishes to sue individually, where the mandataire of the bondholders may have refused or neglected to sue, to begin his action within the month which shall follow the notification to sue addressed to the mandataire by the bondholder; that the irreconcilability of these two periods allowed demonstrates that the law of July 1, 1893, did not give the right of tierce opposition to the bondholders of the Universal Company of the Panama Canal. Considering that Donnadiou is nothing else than a bondholder, notwithstanding his denials; considering that he acted in the proceeding which terminated in a judgment of this tribunal of January 26, 1893, confirmed on appeal by decree of June 29, 1893, as holder of: First, 241 bonds of the Panama Canal Company, 5 per cent, issued in 1882, at 437.50 francs, producing an annual interest of 25 francs and payable in seventy-five years, at 500 francs; secondly, 10 bonds of the same company, called 3 per cent, issued in 1883, at 285 francs, producing an annual interest of 15 francs, and payable at 500 francs; thirdly, 15 bonds, 6 per cent, first series, issued in 1886, at 450 francs, producing an annual interest of 30 francs, and payable in forty-two years at 1,000, by way of drawing by lot. And that, by the terms of said judgment and decree, Donnadiou obtained judgment against the liquidator for the sums hereinafter stated, being the amounts of the bonds of which he was and is yet to-day the holder, to wit:

First, 105,437 francs 50 centimes, the amount of 241 bonds; secondly, 629 francs 1 centime, the amount of the sinking-fund payment accrued on them; thirdly, the part of the coupons unpaid of said bonds, from July 15 to December 14, 1888; fourthly, the sum of 2,850 francs, the amount of 10 3 per cent bonds issued at 285 francs; fifthly, the sum of 149 francs 80 centimes, the amount of the sinking-fund payment accrued on them; sixthly, the portion of the unpaid coupons of the same bonds from October 15 to December 14, 1888; seventhly, the sum of 6,750 francs, the amount of 15 6 per cent bonds, first series, at 450 francs each; eighthly, the sum of 1,569 francs, the amount of the sinking-fund payment accrued on them, calculated at 104 francs 60

centimes each; ninthly, the portion of coupons unpaid of the said bonds from November 15 to the 14th of December, 1888; whence it follows that very far from there having been a novation effected in favor of Donnadiou, and the nature of his credit as against the liquidation of the Panama Canal Company having been changed, the judgment and the decree aforesaid did, on the contrary, settle and sanction, in favor of Donnadiou, the credit resulting for him from the bonds of which he was the holder in such way that he remains, since the judicial decision, what he was before; that is to say, a holder of bonds of the Panama Canal Company, who can act only within the limits and under the conditions prescribed by the law of July 1, 1893; considering, moreover, that Donnadiou so well understood this that in a former suit brought by him against the liquidator and the legal mandataire of the bondholders of the Panama Canal Company, a proceeding terminated by judgment of this chamber of March 17, 1898, Donnadiou presented himself and acted as holder of Panama Canal bonds, and as a creditor of the said Panama Canal Company in the character of subscriber to the bonds above enumerated; considering that Donnadiou is no better grounded in invoking, in the said character of bondholder of the Panama Canal Company, article 2, paragraph 4, whence he claims to draw the right to make use, in his individual name and at his risks and perils, of the present proceeding which the mandataire of the bondholders is alleged to have neglected to institute within the month after the notification to do so, which Donnadiou claims to have addressed to him by documents by Thiellement, bailiff at Paris, on February 19, 1902; considering that it results from the very text of the points submitted by Donnadiou, that by the terms of said document of February 19, 1902, Donnadiou, after having notified Lemarquis of the prohibition which he had the day before made to the New Panama Canal Company to sell the canal and concession, summoned Lemarquis to take all useful means to prevent the making of the proposed sale, declaring to him that, in default of his (Lemarquis') opposing the proposed sale and even in concurrence with him (Lemarquis), Donnadiou intended to oppose it himself by all legal ways and all useful suits. Considering that the said notification can not be considered as fulfilling the requirements of article 2, of the law of July 1, 1893, as to tierce opposition to the judgment of March 19, 1902, since it preceded by a month the very judgment to which Donnadiou claims to make tierce opposition, in default of Lemarquis doing so; considering, consequently, that the tierce opposition of Donnadiou to the judgment of March 19, 1902, is not, from any point of view, admissible.

3. *As to the demand of the New Panama Canal Company against Donnadiou for release from tierce opposition and for damages.*—Considering that according to document of Thiellement, bailiff at Paris, of February 18, 1902, Donnadiou made prohibition to the New Panama Canal Company to proceed to the sale of the said canal, of the concession and its accessories, and that, on the other hand, by another document of the same

bailliff dated February 26, 1902, served on the ambassador of the United States, at Paris, as results from the serving upon the New Panama Canal Company of a copy of the said document, Donnadiou declared his opposition to the cession of the canal, with the declaration that if, notwithstanding his protestations, agreements concerning that cession should be concluded, he would contend for their invalidity and would proceed before all competent jurisdictions to have that invalidity shown, adjudged, and sanctioned. Considering that there exists no legal tie between Donnadiou and the New Panama Canal Company; considering that it results from what precedes that Donnadiou, in his said character of bondholder of the old Panama Canal Company, was represented in all the negotiations of the liquidation of the old Panama Canal Company with the new company by Lemarquis, mandataire of the bondholders, and that he does not even allege that there was between Lemarquis or Gautron and the new company any collusion, which alone would have given Donnadiou a right of individual action under article 1167 of the Civil Code; considering, consequently, that Donnadiou served without right and abusively, the notifications out of court of February 18, 19, and 26, 1902; considering that in serving said documents, and especially that upon the ambassador of the United States, he committed a wrong and caused the New Panama Canal Company an injury, for which he should make compensation, under article 1382 of the Civil Code; considering that the tribunal has at present the data necessary to determine the extent of the injury and to estimate the amount due therefor. For these reasons it admits Lemarquis's intervention; declares Donnadiou's tierce opposition to the judgment of March 19, 1902, inadmissible and rejects it; declares that Donnadiou was without right and without legal character to serve the New Panama Canal Company and the Government of the United States with the aforesaid documents of February 18, 19, and 26, 1902; allows, so far as necessary, a release, pure, simple, complete, and definitive from the prohibitions contained in the said documents of Thiellement of the 18th, 19th, and 26th of February, 1902; declares the said prohibitions void and of no effect; condemns Donnadiou by way of reparation for the injury caused by him to the New Panama Canal Company by the abusive notifications, hereinbefore annulled, to pay to said New Panama Canal Company as damages 500 francs; declares the parties, respectively, unfounded in all their other demands and propositions and rejects them; condemns Donnadiou in all the costs, including those of the intervention of Lemarquis; makes allowance in said costs in favor of de Biéville, Dubourg, and Charneau, solicitors, as requested.

The minutes of the present judgment have been signed at the end: Ditte and Barué.

Done and adjudged in public audience of the first chamber of the civil tribunal of first instance of the Department of the Seine, sitting in the palace of justice at Paris, by Messrs. Ditte, president; Monier, vice-president; Le Berquier, judge; in presence of Messrs. Chauvin, substitute judge, and Rome, substitute of the attorney of the Republic, assisted by Barué, clerk, the 3d July, 1902.

In consequence, the President of the French Republic commands and orders all bailiffs, upon request, to put the present judgment into execution; the general public attorney and attorneys of the Republic near the tribunals of first instance to aid therein; all commandants and officers of the public force to lend forcible assistance when lawfully requested.

In faith whereof the minutes of the present judgment have been signed by the President and by the clerk.

On the margin of said judgment is a note of its recording, as follows:  
"Recorded at Paris the 12th of July, 1902, folio 2, case 8. Received, 18 francs 75 centimes."

(Signed)

RECH,  
*The Receiver.*

By the tribunal:  
Compared.

COQUET.

---

**EXHIBIT 6.**

**ARGUMENT BEFORE COURT OF APPEALS IN DONNADIEU  
CASE, AND DECREE OF THAT COURT OF AUGUST 5, 1902.**

[Shorthand report made by the court stenographer for United States Department of Justice.]

Session of 5th of August, 1902, of the court of appeals of Paris.

M. Lefebvre de Vieville, president; M. Fremont, advocate-general.

M. DONNADIEU  
r.  
THE PANAMA CANAL COMPANY. }

**ARGUMENT OF MANTER THIEBLIN.**

I am going to read to you, gentlemen, the judgment which has been rendered by the tribunal, the confirmation of which we ask of you.

M. Donnadien is a bondholder of the Panama Company; he has attacked by way of tierce-opposition the judgment which was rendered by the tribunal of the Seine in the month of March, 1902, a judgment which authorized the liquidator of the Panama Company to associate himself in the negotiations instituted with the New Panama Canal Company by the Government of the United States for the cession of the Panama Canal to the Government of the United States. We have asked the tribunal to declare that M. Donnadien, in the character of a bondholder of the Panama Company, was not entitled to make such tierce-opposition under the terms of article 11 of the law of 1893, which creates a special situation outside of the ordinary law.

At the same time the New Panama Canal Company summoned M. Donnadien before the tribunal in order to have it declared (M. Donnadien had put in his opposition to that cession, to that sale, which oppo-

sition had been notified to divers persons, by M. Donnadiou, and especially to the Government of the United States in the person of its ambassador, in which notifications he declared that he opposed the sale and that he would demand that it should be declared null and void) the New Panama Canal Company summoned M. Donnadiou before the tribunal to have it declared that his opposition was inadmissible, that no attention should be paid to it; it demanded against M. Donnadiou, a condemnation in damages for the prejudice occasioned by the attitude which he had thus taken.

The following, gentlemen, is the judgment which was rendered by the tribunal:

"The cases being united on account of their connection with each other and determining by one and the same judgment, etc. \* \* \*"

M. Donnadiou has appealed from this judgment, but he has been obliged to recognize that the reasoning of the judgment is altogether unobjectionable. It may be summarized as follows:

The tribunal has passed upon a request made by M. Gautron, as liquidator of the old Panama company, to be authorized to sell according to the project, according to the negotiations, to sell in concurrence with the new company the concession of the Panama Canal and the works which have been accomplished.

The law of 1893 requires the publication of that judgment, in order to give notice to those who might wish to oppose it; but at the same time the law of 1893 limits the right of opposition; it limits it in the matter of time. Article 11 only permits, in effect, the tierce opposition to that judgment to be put in within a month from the date of its publication. After that time all tierce opposition is inadmissible, and the judgment has acquired, with regard to all persons, the authority of *res adjudicata*.

The law of 1893 limits the tierce opposition likewise with regard to persons. There are only three classes of persons who, according to the terms of article 11 of the law of 1893, can put in tierce opposition; these are stockholders of the old company, the mandataire of the bondholders who represents all the bondholders, and the other creditors of the company.

M. Donnadiou put in his tierce opposition within the month, but it remains to inquire whether M. Donnadiou comes within one of the three classes referred to.

He is not a stockholder; he is not a mandataire of the bondholders. Is he one of the other creditors of the company?

He maintains that he was a creditor of the company and was not a bondholder, because, before the law of 1893, which has prohibited individual suits, he had, making use of the running of the clock which the legislature saw fit to interrupt, attacked a judgment against the liquidation based upon the bonds of which he was a holder.

Then said he: "I am no longer a holder of bonds. I am a creditor who is the holder of a judgment. I am a creditor of the company."

The tribunal answers: "Not at all; you are always a holder of bonds, only a holder of bonds who has had the advantage to have received,

before the law of 1893, a recognition of his situation as bondholder and to have it settled by a judgment which has passed into the condition of *res adjudicata*; you are decidedly a bondholder; but if you are a bondholder, you can not put in tierce opposition, because the mandataire alone can do that."

Here, gentlemen, I find an objection which was invincible by M. Donnadieu, and which has prevented him from proceeding in the way of his appeal. It is that this has already been adjudged by yourselves.

M. Laplante had previously desired to make tierce opposition to a judgment, which was entered as between the mandataire of the bondholders and the liquidator. He also was a bondholder. His demand was denied for several motives, and especially for one taken from the application of article 11 of the law of 1893. That judgment bears date of the 10th of May, 1899, and it has been confirmed by adoption of the reasoning of the lower court in a decree of your own of the 25th of April, 1900. If the court wishes, here are the motives which were adopted:

"That in the second place the tierce opposition, where it is restrictively admitted by the law of 1893, is permitted by the articles above mentioned only to the persons whom they enumerate—that is to say, the stockholders, the mandataire of the bondholders, and the other company creditors.

"That it is not allowed to the bondholders taken singly. \* \* \*

These are the very terms which have been reproduced in the judgment here appealed from, and consequently you have already, gentlemen, admitted the truth of this proposition.

M. Gautron has been under the necessity of making as against M. Donnadieu this point of inadmissibility. This was not, you understand very well, from fear of the judgment as to its merits, for the reasons upon which M. Donnadieu made his tierce opposition to that judgment were reasons devoid of every kind of foundation. There was another reason of a public nature. M. Gautron was not able to misunderstand the provisions of the law of 1893 which protect the liquidation, and he is bound to seek to have maintained the course of decision referred to in order that there may not be other cases of tierce opposition put in at inopportune times to embarrass the liquidation of the Panama company.

It is in this state of affairs that, confining myself to the rôle which belongs to me—that is to say, the examination of the judgment so far as the tierce opposition is concerned with it—that I ask you to persevere in your course of decision of 1900 and to confirm by adoption of the reasons given below the judgment appealed from.

ARGUMENT OF MASTER LIMBOURG.

Two words, gentlemen, if the court will permit, in order to explain the attitude taken to-day before it by the legal mandataire of the bondholders, and in order to say why he has not made use in this case of the right which belongs to him by the special law of 1893, and which



belongs to him alone, to make tierce opposition to the judgment of approval rendered by the tribunal of the Seine.

When the cessions made by the liquidator of the old Panama Canal Company, gentlemen, could be the object of different opinions as to their merits, M. Lemarquis has made use of the special right which the law of 1893 gave him. It is thus that when the liquidator demanded approval for the cession which he proposed to make to the new Panama Company of all the assets of the company, M. Lemarquis made tierce opposition to the judgment of approval.

It is not, gentlemen, that M. Lemarquis criticised that cession; it was on account of a very delicate scruple and out of respect for the interest of the involuntary principles which the special law had given him, in order to permit them to present their observations upon intervening in the proceeding of tierce opposition, if they judged it advisable.

It could then be a question whether it was more to the interest of the bondholders to continue the enterprise or to have an immediate settlement.

To-day the situation is no longer the same. No doubt can be had upon the merits of the proposed cession. There are but two possible solutions—either the sale of the enterprise or the construction of the canal.

But the construction of the canal will require the creation of resources which can only be obtained by an appeal to the public. No one will venture to try that, and I do not believe that M. Donnadiou himself, if a request of that kind were made to him, would respond to an appeal for funds. It is necessary then to be resigned to the sale, and it is because that is the better proceeding, the better solution, for the interest of the holders of bonds that M. Lemarquis has abstained from making tierce opposition to the judgment of approval.

#### ARGUMENT OF MASTER GONTARD.

GENTLEMEN: You know from the explanations which have been given you by Master Thieblin that the new Panama Canal Company has proceeded against M. Donnadiou to have thrown out the opposition notified by him to the company itself and to the ambassador of the United States of America at Paris.

The tribunal, put in possession of our demand, declares that M. Donnadiou is without right and standing to notify the said opposition, and so far as necessary, following the reasonings which we have submitted, throws out the opposition and notifications referred to.

In the judgment, gentlemen, there are two reasons given in support of that decision. The first is that M. Donnadiou is without right and standing.

In effect, M. Donnadiou—you know this from the explanations which have been made to you—is not a stockholder of the new company of the Panama Canal, and he is no more one of its creditors.

The PRESIDENT. In his brief submitted he maintains that the new Panama Canal Company, whose advocate you are, could not without violating its by-laws cede the canal.

Master GONTARD. I will furnish explanations on that point. I am explaining very rapidly the reasonings of the tribunal, reasonings which seem to me absolutely conclusive.

These reasons are that M. Donnadiou is inadmissible because without right and without standing with regard to the company. He is without right and standing, I say, on one hand because he is not a stockholder of the new company, on the other hand because he is not a bondholder of it.

Consequently M. Donnadiou has no right to make any opposition, any notification whatever, unless it be in exercising the rights of his own debtor, namely, the old company (article 1166), or in bringing a direct personal action which might belong to him in case of collusion (article 1167 of the Civil Code).

As to article 1166 there can be no question, for the excellent reason that a creditor can not make use of the rights of his debtor except where the latter does not himself act. But in the present instance the debtor does act, since that debtor is the liquidation of the Old Panama Company, and since it is an act of M. Gautron that M. Donnadiou pretends to criticise by way of tierce opposition.

As for article 1167, there is no question for the excellent reason that M. Donnadiou does not dare raise his voice with regard to any collusion of any kind whatever as existing between M. Gautron or M. Lemarquis—always solely mindful of the interests which have been confided to them—and the New Panama Canal Company.

As a result he is absolutely inadmissible, certainly so, and to sum up (permit me to make use of this consideration which has been developed by the advocate of the Republic in the first instance), M. Donnadiou, by his notification or his opposition, undertakes to make use of a power which does not belong to him, a power to make opposition at a given time, when to that opposition the law of 1893, which has just been analyzed for you, puts an insurmountable obstacle.

Is it to be said that I would have any distrust of going to the foundation of the matter and considering the two observations which M. Donnadiou has made in his reasonings on appeal after having already indicated them in the court of first instance? By no means, and I am going to demonstrate that to you.

What are these objections? There are two of them. He says to you on one hand: The New Panama Canal Company can not cede the canal.

It can not cede the canal? Why? What reasons does he give? It can not cede the canal because, according to the terms of its by-laws, its object is the carrying on of the canal; because by the terms of article 60 of the same by-laws it can not change this object as to its essence, and because the sale of the canal would place the company in a position where it would be impossible to carry it on, and consequently to carry out what was its object. It can not change that object, says M. Donnadiou, it can not suppress it by the sale; consequently the sale is not possible.

You understand very well that it is easy to push this reasoning to an absurdity in order to show its error, for this reasoning conducts to

nothing less than to condemn to life companies which, not having accomplished their object, have a greater interest in ceasing to exist during the time fixed for their duration.

This is, so to speak, an absurdity arising from the by-laws of the company, but here there is more; it is that our adversary forgets that by the terms of article 60 of the by-laws which he invokes so far as it forbids the company to modify its object, he forgets that in the same article 60 the anticipated dissolution of the company is provided for, and consequently the right of the company to put an end to its company life when it has an interest in so doing is provided for.

Then, if the anticipated dissolution is contemplated by the by-laws, the company has the right to put an end to the company life; consequently the right to proceed to liquidation and sale of the concessions which belong to it. It appears to me, gentlemen, that on this point there can be no doubt in the mind of any man of good faith who wishes to examine the by-laws of the New Panama Canal Company.

Consequently, where does there appear any transgression of the social compact if we place ourselves absolutely in the position M. Donnadiou takes and admit that he has the right to discuss here our social compact, in a thing which is in reality but the application of the compact itself?

The sale, he says, is the suppression of the company's object. But he ought to continue further; it is the anticipated dissolution. But the anticipated dissolution is foreseen by the by-laws; it is lawful and possible. Then the sale of the canal is possible and lawful in the same circumstances as the anticipated dissolution. This first argument, then, is not serious.

There is another which, I believe, is not contained in the reasonings on appeal which have been communicated to me. It was made use of by M. Donnadiou in the court of first instance, and may be stated thus: It is that the stipulation which took place between the new company and the liquidation of the old company obliged the New Panama Canal Company to carry on the canal.

This is the reasoning: By the terms of the by-laws, as compensation for the contribution made by the liquidation of the old company to the new company, it was allowed 60 per cent of the benefits of carrying on the canal. The new company, says M. Donnadiou, can not free itself from this 60 per cent; it can not free itself by selling the canal; then it can not sell the canal.

You will remark, gentlemen, that this is the first argument reproduced under another form; consequently the response which I have had the honor of indicating for the first argument applies to the second.

But let us go further.

In what is stated, there is an error which belies the right of anticipated dissolution given to the new company by article 60, as also the provisions of another article of the by-laws, article 5, which contemplates the case of the nonexecution of the canal.

Hence the sole question which presents itself in the case of a sale is the question of the division of the price, upon which the by-laws con-

tain nothing in express terms, but upon which the by-laws impliedly contain some information, a question which has been settled by the arbitration to which allusion has been made in the documents of tierce opposition presented by M. Donnadiou. I venture to observe also that the contributor of property in kind to the company about to be formed, who has been the author of the stipulations concerning the contribution, is the sole judge of the consequences which the alienation of the whole or part of the properties may carry with it in respect of the stipulations which he has made.

In the present case, the assent of the liquidator, the contributor to the new company, an assent shown by the judgment of approval according to the terms of the law of July 1, 1893, is of such a nature as to safeguard all rights, all interests. And the fact itself, gentlemen, that M. Gautron has intervened in the negotiations, he being the liquidator of the old company, that M. Gautron, on the other hand, is protected in the arrangements to which he has given his assent by the high approval given by the tribunal according to the terms of the law of 1893, causes to disappear all objection under this heading and all uncertainty.

In conclusion (here I return to the argument made by M. Thieblin), it is necessary to recognize that no one interested is admissible to criticize or contradict the assent given by M. Grutron except under the terms of the law of July, 1893, that M. Donnadiou is not at all within the terms of that law, and that from this point of view M. Donnadiou can not make any objection.

Thus, you see, M. Donnadiou, who is inadmissible, very certainly, as a result of his lack of standing (*qualité*), who can not exercise the action oblique of article 1166, which does not belong to him be it remarked, in the presence of a debtor who himself exercises the right, M. Donnadiou, who can not pretend to make use of the suit allowed by article 1167 for the excellent reason that he will not venture to pronounce the word "fraud," which would be necessary for that suit, M. Donnadiou, not admissible, is certainly on the merits without good grounds of proceeding, for the argument which he develops (there are two of them, but he develops only one, since the two are inconsistent with each other), the argument taken from article 60 falls, because that article permits the company to dissolve itself by anticipation.

Then, independently of general principles which conduct us to this solution, we have the texts themselves, which very certainly show the lack of foundation for the objection of M. Donnadiou.

It is with these short observations that I persist confidently in the reasonings which I have submitted in writing.

The PRESIDENT. Outside of the opposition made by M. Donnadiou, is there any opposition to the sale, made by some of the stockholders?

M. THIEBLIN. None, and there was no tierce opposition in the period of one month, consequently I am in the presence of all, and all persons are bound.

In the most general way, the judgment which approved on the 19th

of March, 1902, the project of cession, is a judgment which has acquired the authority of res adjudicata; it is unattackable.

The PRESIDENT. Mr. Advocate-General, what are your reasonings?

Advocate-General FREMONT. I think there should be confirmation.

The PRESIDENT. The decree will be rendered at the resumption of the session.

The session is suspended.

DECREE OF THE COURT.

Adopting the reasons of the first judges, which respond sufficiently to the conclusions of the parties.

Confirms in all its provisions and condemnations the judgment appealed from.

Rejects all contrary reasonings of Donnadieu.

Condemns the appellant in the fine and costs.

---

EXHIBIT 7.

JUDGMENT OF JULY 3, 1902 (CIVIL TRIBUNAL OF THE SEINE), DECIDING AGAINST SAUTEREAU.

[3d of July; First chamber, No. 2—First section.]

THE FRENCH REPUBLIC, IN THE NAME OF THE FRENCH PEOPLE.

The civil tribunal of first instance of the department of the Seine, sitting in the palace of justice at Paris, has rendered in public session of the first chamber the following judgment, session of 3d July, 1902.

Between the New Panama Canal Company, an anonymous association having its headquarters at Paris, Rue Louis le Grande, No. 7, acting through the president and members of its council of administration,

Plaintiff, appearing, briefing, and arguing by Maitre Gontard, advocate, assisted by Maitre Dubourg, solicitor,

On the one part,

And M. Sautereau, engineer, dwelling at Paris, Rue Tarthout, 14, proceeding as well in his personal name as in the name and character of alleged "director of the International Association of Studies for the Accomplishment of the Panama Canal,"

Defendant, appearing by Maitre Vorgeot, solicitor, in default, not having submitted his brief,

On the other part,

Without the present characters of the parties being able to prejudice in any manner their respective rights and interests.

POINT OF FACT.

The plaintiff alleging that according to a document out of court through the instrumentality of Baudin, bailiff at Paris, dated the 20th of December, 1901, served upon the plaintiff, M. Sautereau declared his opposition

to the sale as well as to the putting into execution of a project for the construction of the canal adopted by the new company, which he declared to be his property or that of those in privity with him, adding that he made all reservations to obtain all recoveries that he might be entitled to;

That, in support of his opposition, M. Sautereau alleged, especially, that, after several years of alleged studies, the new company had adopted a definitive project for the accomplishment of a canal at Panama, which was an exact and complete reproduction of a project submitted by him to the liquidation of the first Panama Canal Company, which constituted, he said, a veritable spoliation of his rights and the rights of those interested with him—the International Association of Studies for the Accomplishment of the Panama Canal, of which he was the founding director;

That M. Sautereau complains, consequently, of never having received, notwithstanding his reiterated demands, any reimbursement nor any remuneration whatever for all the work, studies, proceedings of all kinds, etc., undertaken by him on behalf of the liquidation of the first Panama company; and because, although these things constituted a notable part of the assets of the new Panama company, the latter proposed to sell them to the Americans in disregard of his rights;

But that there did not exist any legal relation, (“*lien de droit*,”) between M. Sautereau in his aforesaid characters and the plaintiff company;

That the opposition above mentioned was made without legal title or authority; that it is proper to establish its nullity and to declare a release therefrom pure and simple.

Done according to document through the instrumentality of Eignet, bailiff at Paris, dated 25th April, 1902, recorded, to serve notice upon M. Sautereau to appear within eight full days allowed by law and through the instrumentality of an advocate constituted at the session of and before the president and judges composing the civil tribunal of the Seine, at the palace of justice at Paris, 11 o'clock in the morning, in order, for the above-stated reasons,

To have declared null and of no effect the opposition notified at the request of M. Sautereau in the characters aforesaid, served by him upon the company plaintiff according to document of Baudin, dated at Paris, 20th December, 1901;

And to have decreed release pure and simple, entire and definitive, therefrom; and to have M. Sautereau condemned in all the costs, under all the reservations and notably reserving all damages.

Upon the summons which contains the constitution of Maitre Dubourg, solicitor for the New Panama Canal Company, M. Vorgeot, solicitor, was constituted for M. Sautereau, according to document of the palace, dated 2d May, 1902.

Record was drawn up by M. Dubourg, solicitor for the plaintiff, and the case, entered upon the general roll of the clerk's office, was distributed to the civil tribunal of the Seine, before which, according to

document of the palace, dated 9th June, 1902, M. Dubourg gave notice to his confrère for Wednesday, 11th June following, for argument.

On said day, and after several successive postponements, M. Vorgeot, solicitor, not having filed his brief on the merits, and the matter having been called up regularly at the session of this day, M. Gontard, advocate, assisted by M. Dubourg, solicitor of the plaintiff, presented himself at the bar of the court, and required finding of default against M. Sautereau and Maitre Vorgeot, his solicitor, for not having filed his brief, and adjudication of his original pleading.

The public minister has been heard as to his conclusions. In this condition the case presents for adjudication the following question:

POINT OF LAW.

Should the tribunal declare default against M. Sautereau and Maitre Vorgeot, his solicitor, for failing to file brief, etc.?

Should it declare null and of no effect the opposition notified at the request of M. Sautereau in the characters in which he appears to the plaintiff company, according to the document of Baudin, bailiff, at Paris, dated 20th December, 1901?

Should it order release therefrom pure and simple, entire and definitive?

Should it, on the contrary, declare the New Panama Canal Company inadmissible or unfounded in its demands and dismiss it?

What as to costs?

With all reservations. Document submitted. For original. Signed Dubourg.

The tribunal, having examined and heard the various propositions and pleadings of Gontard, advocate, assisted by Dubourg, solicitor of the New Panama Canal Company, acting through its president and the council of administration;

The public ministry having been heard, after having deliberated according to law, judging in an ordinary matter and in first resort:

Declares default against Sautereau and Vorgeot, his solicitor, for not having filed a brief, and gives judgment of default in favor of the plaintiff;

Considering that according to a document out of court, served through Baudin, bailiff at Paris, dated 20th December, 1901, upon the New Panama Canal Company, Sautereau declared himself opposed to the sale as well as the putting into execution of a project for construction of the canal by the new company; that he claims it to be his property or that of those interested with him, adding that he made all reserves to obtain all recoveries which might belong to him;

Considering that in support of his opposition Sautereau alleges especially that after several years of alleged studies the New Panama Canal Company adopted a definitive project for the accomplishment of a canal, which will be the exact and complete reproduction of the project submitted by him to the first Panama Canal Company, which will constitute, he says, a veritable spoliation of his rights and of the rights of

those interested in the International Association of Studies for the Accomplishment of the Panama Canal.

Considering that Sautereau complains in consequence that he has never received, notwithstanding his repeated demands, any reimbursement nor any remuneration for all his work, studies, proceedings of all kinds, etc., undertaken by him on account of the liquidation of the first Panama company, and because, while these works constitute a notable part of the assets of the New Panama Canal Company, the latter proposed to sell them to the Americans in contempt of his rights;

But, considering that there exists no legal relation between Sautereau in his characters aforesaid and the plaintiff company;

That the opposition above stated was made without title or authority;

That it is proper to establish its nullity and to declare pure and simple release for it for these reasons;

Declares null and void the opposition notified at the request of Sautereau in his characters aforesaid to the plaintiff company by document by Baudin, bailiff at Paris, dated December 20, 1901;

Decreases a release therefrom pure and simple, entire and definitive, and condemns Sautereau in all the costs, from which an allowance is made for Dubourg, solicitor, who has demanded it.

(Signed)

DITTE and BARUÉ.

Done and adjudged by Monsieur Ditte, president; Monier, vice-president; Le Berquier, judge;

In presence of M. Chauvin, substitute judge; M. Rome, substitute, assisted by Barué, clerk, the 3d July, 1902.

In consequence, the President of the French Republic commands and orders all bailiffs required to do so to put the present judgment in execution, etc.

CERTIFICATE OF SERVICE—PANAMA COMPANY AND SAUTEREAU.

I, the undersigned, Firmin Paul Dubourg, attorney of the Civil Tribunal of the Seine, residing at Paris, No. 5 Place St. Michel,

Certify that a judgment rendered by default for failure to defend by the First Chamber of the Civil Tribunal of the Seine, on Thursday, July 3, 1902, recorded, between:

The New Panama Canal Company, a joint stock company, having its principal office at Paris, No. 7 rue Louis-le-Grand, acting by and through the President and members of its Board of Directors,

Plaintiff, for whom I appeared,

And M. G. Santereau, engineer, residing at Paris, No. 14 rue Taitbout, a party as well in his personal name as in the name of, and calling himself "Manager of the Société Internationale d'Etudes pour l'achèvement du Canal de Panama,"

Assisted by Me Norgeot, attorney,

Which judgment dissolved the prohibition served at the request of M. Sautereau, in his official capacity, upon the company making appli-



cation, according to notice of Baudin, Court Officer at Paris, dated December 20, 1901,

Was served upon the attorney, by notice in court of the date of July 11, 1902, and upon the party, according to the return of Peignet, Court Officer at Paris, under date of July 15, 1902, recorded.

And that there has been no opposition to, nor appeal from the said judgment, to my knowledge.

In testimony whereof I have delivered the present certificate to serve and avail, according to law.

DUBOURG.

PARIS, *September 22, 1902.*

---

**EXHIBIT 8.**

**JUDGMENT OF MARCH 8, 1889 (COURT OF APPEALS OF PARIS),  
DECLARING THE CIVIL CHARACTER OF THE OLD PANAMA  
COMPANY.**

[Taken from the minutes of the clerk's office of the court of appeals of Paris.]

(This document is very long, containing a recital of the proceedings below, briefs, arguments, etc. Only the concluding part is here given, the remainder being on file, in French, in the Department of Justice.)

The court, after having heard at the session of March 5, instant, as to their respective propositions and arguments,

Denier, advocate of Brunet, liquidator of the Universal Company of the Interoceanic Canal of Panama, assisted by Dumas, solicitor;

Crarieux, advocate of the Company of Public Works and Constructions, assisted by Dethemont, solicitor;

Levasseur, advocate of Menier Mehut, assisted by Durnerin, solicitor, As well as the propositions of M. Manuel, advocate-general;

And after having deliberated according to law,

The announcement of the decree was postponed until this day.

Passing as well upon the appeal interposed by the liquidator of the Universal Company of the Interoceanic Canal of Panama against the Company of Public Works and Constructions, from the judgment of the tribunal of commerce of the Seine of the 18th February, 1889, as upon the intervention of Menier Mehut;

No complaint of nullity or objection of inadmissibility having been submitted or contended for as against the appeal;

Considering that by the judgment of 18th February, 1889, the tribunal of commerce of the Seine declared itself competent to pass upon the demand of the Company of Public Works and Constructions against the Panama Company, and decided that this company is commercial;

That a previous decision of the civil tribunal attributed, on the contrary, to this company the civil character;

Considering that the civil or commercial character of the company depends exclusively upon the object of the company and not upon the particular form which it has pleased the parties to give it;

That this is so, even when the parties have employed a form which, like that of an anonymous company, is more especially affected by companies of commerce;

That the division of the company capital into shares, and loans by way of bonds, do not constitute a method of appeal (to the public), which is exclusively reserved to companies of commerce, and which can not be employed except upon condition of being submitted to the commercial jurisdiction;

That it is proper to examine the object, and, consequently, to inquire into the legal character of the anonymous interoceanic company of Panama;

Considering that, according to the terms of the law of the Congress of May 18, 1878, the Government of the United States of Colombia conceded to an international civil company the exclusive privilege of opening across its territory a maritime canal between the two oceans, with power to constitute within two years a universal anonymous company charged with its construction;

That article 2 of the by-laws of the company thus constituted states that the object of the company is:

First. The constitution of a maritime canal on a large scale.

Second. The operation of said canal and divers enterprises belonging to it.

Third. The construction and operation of all lines of railroad that the company may think well to construct or buy in the neighborhood of the canal for the good of the enterprise.

Fourth. The exploitation of the lands granted and of the mines in them,

The whole under the clauses and provisions of the law of Congress;

That from these provisions, as well as from the acts of concession and the by-laws of the concessionary company, it appears that the principal end contemplated by the parties was the opening of a navigable way between the two seas; that is to say, the execution of public works of general interest tending to have for a result the putting into value immovable property making part of the public land of the State;

That the fact that a company has been subrogated for a limited time to the rights of the State can not change the nature of the enterprise and take away the civil and immovable property character which it would undoubtedly have preserved if the Government of Colombia had taken charge of its direction;

That it is proper to examine whether the primitive character and principal object of the concessionary company were modified by other causes:

In the first place, the distinction proposed by the lower judges between the construction and operation of the canal should be condemned.

From the point of view of the object of the company those two businesses go together.

That the operation consists principally in the reception of payments

which are nothing but the necessary remuneration of the capital invested for the construction and the indispensable means for realizing on that;

That the distinction between the operation and the construction being left out, it remains to examine under what circumstances both of them are to be effected in the future;

That it is maintained that by the terms of article 2 of the by-laws above referred to the company performs an act of commerce:

First. As undertaker of the constructions.

Second. As undertaker of transportations.

Third. As exploiting the mines and lands granted.

On the first point, considering that the company is not charged by the act of concession merely to construct a canal which it is to abandon to the State at the end of the work:

That a contract has been made from which it results that the company charged with its construction is to remain in possession and benefit from the products of operation during ninety-nine years, dating from the day of its opening;

That thus it constructs not in reality for the benefit of another, but for its own benefit, and in its own interest as well as for that of the Colombian Government whose associate it remains;

That it should, consequently, be assimilated to an individual constructing for himself, and in his own proper interest;

That an enterprise done under these conditions can not be considered a commercial act under the terms of articles 632 and 633 of the Code of Commerce.

On the second point, considering that the Interoceanic Company of Panama does not propose to transport travelers and merchandise by land or by water as a carrier and railroad company or a steamboat company:

That the principal object and the characteristic object of the company is not transportation, but a way destined for transportation on which will be received dues of toll;

That these rights or receipts will be received on a tariff fixed by the law of concession by virtue of a delegation of the sovereign State;

This latter does not perform an act of commerce, if it receives them itself;

That it is the same as to the company which is regularly substituted for it;

That, finally, the receipt of dues or tolls on canals does not constitute in itself an act of commerce subject to the consular jurisdiction;

That it is vainly objected that paragraph 3, article 2, of the by-laws provides for the construction and operation or purchase of a railroad line in the neighborhood of the canal for the good of the enterprise;

That it results from the express terms of this paragraph, as from the general spirit of the company's by-laws, that it is only for the object of favoring the principal enterprise and assuring its execution that the accessory and assistant of a railroad called auxiliary has been contemplated in the contract;

That this can not have the effect to modify the primordial and essential character of the company;

That if it is true that the Interoceanic Company has bought the greater part of the shares of the railroad from Panama to Colon, which serves not only for the works of the company but effects the transportation of travelers and merchandise from one sea to the other, the documents produced to the court establish that this company remains distinct from the canal company;

That it possesses a director-general of administration and accounts of its own;

That its company seat is in New York;

That its juridical individuality has not disappeared, to confound itself with that of the canal company;

And that such would not be the effect of the holding by the latter of a number more or less considerable of shares, varying according to the changes of the financial situation.

On the third point:

Considering that the nation of Colombia has given to the Interoceanic Company as an aid for the execution of the work 500,000 hectares of public land with the mines they may contain;

The exploitation of this domain, not yet commenced, can not in any event constitute a commercial enterprise;

That there is only in effect the putting into value of immovables and mines;

That admitting that the division and the sale of the whole or part of the domain by the establishment of alternate lots on the coasts of the canal and seas presents the characteristics of a speculation, besides being lawful and contemplated by the concession, it does not constitute an act of commerce, but an act, or series of acts, of dealing with immovable property, the character of which is purely civil;

That if the statements of articles 632 and 633 concerning acts of commerce are not restricted, they should not be extended by analogy to objects not of the same nature; that is to say, immovable in their essence;

That they exclude, necessarily, operations concerning immovables and those concerning mines, which are ruled by special law;

That for want of general arguments, taken from article 2 of the by-laws, it is maintained that a commercial character of the Interoceanic Company can be demonstrated from divers and detailed provisions contained in the act of concession;

That there is especially pointed out the faculty given to the company to receive payments for repair, pilotage, towage, deposit, and storing, and the obligation accepted by it to transport on the line of the canal the agents of the Colombian Government;

Considering that these divers provisions and receipts, of insignificant importance in comparison with that of toll, which is connected with them, have only an incidental character;

That they belong to the principal object of the enterprise without, however, absorbing it or modifying it;

That if, as the result of circumstances not yet arisen, the company should be required to perform some acts of a commercial nature, it would not result that the primordial and essential character of the civil company constituted by the by-laws would be annihilated;

That the company would find itself only placed in the situation of an individual, not a merchant, who, as the result of certain acts contemplated by the Code of Commerce, might become, as an exceptional matter, subject to the tribunal as to the exception.

As for what concerns the transportation on the Isthmus of agents of the Colombian Government;

Considering that the obligation to make that transportation gratuitously was imposed upon the company by article 8 of the concession;

That it is one of the charges for that concession, and not an act of commerce;

That from the preceding considerations, it arises that the Inter-oceanic Company of Panama is not in fact either a constructor or undertaker of work for the benefit of another;

That whatever may be the character of certain accessory clauses and detailed provisions inserted in the by-laws and in the act of concession, the principal and dominant object of the company is not commercial;

That its legal character is that of a civil company concerned with immovables, subjected, as all other companies concerned with immovables, mines, or canals, to the jurisdiction of ordinary law;

That it is of no consequence that divers proceedings were introduced heretofore before the tribunal of commerce without any exception having been taken as to its jurisdiction;

That it is established that a great number of other litigations have already been taken before the civil tribunal;

And that the exception for want of jurisdiction *ratione materiæ* is a matter of public order and can always be invoked;

For these reasons, and without its being necessary to pass upon the objection of inadmissibility interposed to the intervenor;

Annuls the judgment of the tribunal of commerce of the Seine of the 18th February, 1889;

Deciding anew, discharges the appellant from the condemnations and dispositions of which he complains;

Receives Menier Mehut as intervenor in the proceeding;

Declares that by reason of its principal object, the company of the Inter-oceanic Canal of Panama is a civil company concerned with immovables;

Declares that the tribunal of commerce was without jurisdiction of the demand against it by the Company of Public Works and Constructions;

Orders the parties before the proper tribunal for the matter to be passed upon;

Dismisses the Panama Company, the Company of Public Works and

Constructions, and Menier Mehut as to all other demands, exceptions, and propositions;

Orders the restitution of the fines to the Panama Company;

Condemns the Company of Public Works and Constructions in the costs in the first instance and appeal;

Condemns Menier Mehut for the costs of his intervention;

Settles the costs of the Company of Public Works and Constructions in the intervention at ———;

Those of the Panama company in the first instance at ———

On appeal at ———

On the intervention at ———

These comprising the dues of qualification, record, of the minutes, cost and notification of the present decree;

Allowance made in the said expenses for fees of Bethemont and Dumas, solicitors, who have required this, upon their showing what may be due them;

Done and pronounced in the court of appeals of Paris, Friday, May 8, 1889, at the public session of the first chamber, where were present and sitting:

M. de Viefville, president.

MM. de Laborie, Merlier, Gues, Caze, Robert, and Pilet des Jardins, counsellors.

In the presence of M. Harel, substitute for the general attorney.

Holding the pen, Me. Pioge, clerk of the session.

The minutes of the present decree have been signed by the president and by the clerk of the session.

On the margin is to be read: Registered at Paris, March 13, 1889, page 83, case 19. Received 37 francs 90 centimes. (Signed:) Druilhet.

Copy conforming to the original: the chief clerk.

ADM. LOICHEMOLLE.

Examined for the authentication of the signature of Me. Loichemolle, clerk of the court of appeals of Paris, on the opposite page.

Paris the 26th of August, 1902.

For the first president:

EDM. AUBRY.

---

**EXHIBIT 9.**

**CERTIFICATES OF AUGUST 21-30, 1902, BY THE LIQUIDATOR, CONCERNING JUDICIAL AND OTHER MORTGAGES, PLEDGES OF PERSONAL PROPERTY, AND LIENS IN GENERAL. (SEE ALSO EXHIBIT 12.)**

**Q. (a)** What proceedings in courts, including the court of cassation, have taken place since those set forth in the sixth report of the liquidator?

A. In France two proceedings had not yet received final settlement at the date of the sixth report of the liquidator, November 14, 1900:

1. The affair of Gautron, liquidator, against the council of mandataires of the civil company for the redemption of new bonds, third series (issue of March 14, 1888). (See sixth report, pp. 18 to 21.) The court of appeals of Paris, by decree of July 17, 1901, has confirmed the judgment in favor of the liquidator. The council of mandataires has appealed to cassation against that decree.

2. The affair of Von Berg. (See sixth report, p. 21.) Messrs. Von Berg & Co. claimed from the liquidator the sum of 190,577 francs, with interest from May 5, 1888, as the price of a steam excavator, of a transporter, and accessory implements, etc. By judgment, dated August 7, 1901, the civil tribunal of the Seine condemned the liquidator to pay Messrs. Von Berg & Co. only the sum of 6,000 francs. On November 15, 1901, Messrs. Von Berg & Co. appealed from that decision. The matter is pending before the court of appeals of Paris.

Paris, August 21, 1902.

GAUTRON,

*The Liquidator of the Universal Company  
of the Interoceanic Canal.*

Q. (b) What mortgages, judicial or other, affected the immovable property of the canal company on July 1, 1893? What has been done since with regard to them by the mandataire, or the creditors, or the bondholders in France or in Colombia?

A. On the 1st of July, 1893, the Universal Company of the Interoceanic Canal represented by the liquidator did not possess any immovable property in France. In Colombia, the immovable property which it possessed on the Isthmus has not been the object of any execution proceeding.

PARIS, August 21, 1902.

GAUTRON,

*The Liquidator of the Universal Company  
of the Interoceanic Canal.*

Q. (c) What mortgages, attachments, or other equivalent things existed on July 1, 1893, as to personal property?

A. The liquidator has stated in the fourth report, pages 15 to 21, the situation of the movable assets of the old company on July 1, 1893. The lottery bonds, unissued and remaining in his hands, were seized by Messrs. Baudouin, Piza Lindo & Co., contractors of the old company, by divers bondholders, and by the registration office.

Thirty thousand five hundred shares of the Panama Railroad Company were pledged to divers contractors of the old company to guarantee the payment of the sums due for work done after the dissolution of the Universal Company of the Interoceanic Canal. Messrs. Baudouin, Piza Lindo & Co. took at New York measures to secure their rights which paralyzed the rights of the liquidator as to the Panama Railroad Company.

The fourth report indicates, on pages 16 et seq., how the liquidator successfully obtained:

1. The release from the seizures at the instance of Messrs. Baudouin, Piza Lindo & Co. and divers bondholders, of the lottery bonds remaining on hand;

2. The abandonment of the measures taken by Messrs. Baudouin, Piza Lindo & Co. as to the shares of the Panama Railroad Company;

3. The return by the contractors of the 30,500 shares of the Panama Railroad Company which had been given to them as a pledge.

Tables annexed to the present note show the sums paid to divers creditors of the old company in order to render absolutely free the movable assets of the liquidation.

It is proper to add that the registry office seized the lottery bonds remaining on hand, in order to secure the payment of the stamp and transfer taxes upon the shares and bonds of the old company. The said dues amounted to the sum of 5,185,595 francs, 35 centimes. The law of July 1, 1893, article 12, remitted that debt of the liquidation. (See third report, p. 177.) Consequently the liquidator obtained from the registry office a release from the seizures it had caused of the lottery bonds remaining on hand.

PARIS, August 21, 1902.

GAUTRON,

*The Liquidator of the Universal Company  
of the Interoceanic Canal.*

Q. (d) What mortgages, judicial or other, or attachments or other equivalent things, affecting the movable or immovable property, have come into existence since July 1, 1893?

A. In France the movable property of the Universal Company of the Interoceanic Canal represented by the liquidation has not been the object of any proceedings in execution since the 1st of July, 1893. The liquidation possesses no immovable property in France.

In Colombia, the liquidator finds himself at the present moment in presence of three proceedings, the first phases of which are set forth in the sixth report of the liquidator: The affair of Schuber, sixth report, p. 23; the affair of Icaza, sixth report, p. 26; the affair of Domingo Diaz, sixth report, p. 24. (See sixth report, pp. 23 to 26.)

In the matters of Schuber and Icaza, M. Schuber caused to be seized and sequestered the building of the director of the New Panama Canal Company; the heirs of M. Pablo de Icaza caused to be seized and sequestered the building of the company. At the end of a great number of decisions upon contests, by the Colombian judges—decisions which declared void the seizure and sequestration of these immovable properties—General Alban, governor of Panama, considered it for the interest of the Colombian Government to have established the inalienability of the two immovable properties seized, which by the terms of the act of concession (Law 28 of May 18, 1878, article 23) were to return to the Colombian Government in case of the forfeiture of the concession. Con-



sequently, on October 5, 1901, the governor instructed the official attorney at the tribunal of Panama to introduce, in the name of the nation, a tierce opposition of exclusion as to the immovables seized.

A Colombian judge declared that opposition inadmissible, basing his decision on the fact that General Alban did not represent the Colombian Government. As a matter of fact, the seizure and sequestration of the two immovables continues, but the liquidator has been informed, by a letter of March 24, 1902, that the Government of Bogotá ordered the official attorney at Panama to introduce a new tierce opposition in the name of the nation. The order as to this tierce opposition was inserted in the Official Journal. Finally, as a result of that tierce opposition, the superior tribunal of Panama by a decision of May 7, 1902, setting aside its previous decision, suspended the judgment which established the seizure and sequestration and ordered notification to be given to the liquidator.

If, as there is reason to hope, the Colombian Government causes the immovables of the company to be declared inalienable and nonseizable, the liquidator will have only to await the notifications ordered by the superior tribunal.

Affair of Domingo Diaz, sixth report, p. 24. The supreme court of Bogotá rejected the application en cassation presented by the liquidator. An expert examination being necessary to determine the lands in regard to which the recovery of M. Diaz will be founded, the liquidator reserves the right to defend before the experts the rights of the Universal Company of the Interoceanic Canal.

In a letter of February 1, 1902, the advocate of the liquidator informed him that there was reason to believe that the papers in the Domingo Diaz matter were lost at the time of the attack by the Colombian revolutionists upon the postal courier between Bogotá and Honda.

In any event, in the three affairs of Schuber, Icaza, and Domingo Diaz, the liquidator is ready to take the steps, and if need be to make the sacrifices, necessary to prevent the Government of the United States, if it shall acquire the canal, from being disturbed in the enjoyment of the immovable properties which will be ceded to it.

Paris, August 21, 1902.

GAUTRON,

*The Liquidator of the Universal Company  
of the Interoceanic Canal.*

Q. (e) What judicial or other mortgages, attachments, liens, or the like exist in favor of creditors, bondholders, stockholders, or the liquidator at the present time?

A. There exists at the present time no mortgage, seizure, pledge, or other thing for the benefit of creditors, bondholders, or shareholders upon the assets of the liquidation.

Paris, August 21, 1902.

GAUTRON,

*The Liquidator of the Universal Company  
of the Interoceanic Canal.*

Q. (f) What has become of the Donnadieu affair of 1898?

A. As has been stated in the sixth report, pages 17 and 18, the claim of M. Donnadieu to have communicated to him by Messrs. Lemarquis, mandataire of the bondholders, and Gautron, liquidator of the Universal Company of the Inter-oceanic Canal, the documents useful for an action to obtain payment of the company assets, especially the register showing transfer of the shares of the said company (Universal Company of the Inter-oceanic Canal), was denied by a judgment of the civil tribunal of first instance of the Seine, dated March 17, 1898. (See sixth report, p. 79.)

This judgment was confirmed by a decree of the court of appeals of Paris of August 4, 1898. (Sixth report, p. 77.) This decree was executed and has become final.

Paris, August 21, 1902.

GAUTRON,  
*The Liquidator of the Universal Company  
of the Inter-oceanic Canal.*

Q. (g) Why was it necessary to have the law of June 8, 1888, concerning lottery bonds?

A. The circumstances in which the old Panama Company solicited the authorization to issue lottery bonds are set forth in the first report of the liquidator, pp. 6 and 7.

The last loans proposed to the public had partially failed. On July 26, 1887, the company had offered for subscription 500,000 bonds, 6 per cent, at 440 francs, repayable at 1,000 francs. The public subscribed only 258,887 bonds. On March 14, 1888, the company put out 350,000 bonds at 460 francs, payable at 1,000 francs. The public subscribed only 112,483 bonds.

The company thought that a loan would have more chance of success if it was presented in the form of bonds giving a right to considerable prizes, the payment of which would be guaranteed by a special arrangement. But in France lotteries are prohibited, generally, by a law of May 21, 1836, by article 1 thus worded: "Lotteries of all kinds are prohibited."

A special law, analogous to those that have authorized the city of Paris, the Credit Foncier of France, and the Suez Canal Company to issue lottery bonds, was necessary to get rid for the Panama Company of the prohibition decreed by the law of May 21, 1836. The law which authorized the Panama Company to issue lottery bonds, voted by the Chamber of Deputies and the Senate, was promulgated on June 8, 1888.

Paris, August 21, 1902.

GAUTRON,  
*The Liquidator of the Universal Company  
of the Inter-oceanic Canal.*

Q. (h) Have there been any other bond issues authorized by laws specially passed for that purpose, and has there been other authority

granted to the old company; and was there ever any authorization or surveillance of the old company by the public administration?

A. No other issue of bonds of the Universal Company of the Inter-oceanic Canal, represented by the liquidator, has been authorized by a special law. The only authorizations are those which have been accorded:

1. By the law of June 6, 1888, to the Universal Company of the Inter-oceanic Canal, then solvent, to issue lottery bonds.

2. By the law of July 1, 1889, to the liquidator of the Universal Company of the Inter-oceanic Canal, to negotiate the lottery bonds without limitation of price and without interest.

The Universal Company of the Inter-oceanic Canal, represented since February 4, 1889, by the liquidator, being a company absolutely private, the Government (administration) has no right to exercise any surveillance. When the Universal Company was solvent, it was subject to no control by the Government (administration), but the judicial power had the right to repress infractions of its by-laws, and of the laws governing companies, which it might have committed. The judicial power never had to make use of that right.

Since the dissolution of the company the liquidator, representing the Universal Company of the Inter-oceanic Canal, finds himself placed under the control of the civil tribunal of the Seine which appointed him and has had the power to dismiss him. The law of July 1, 1893, has specially regulated, as concerns the liquidation of the Universal Company of the Inter-oceanic Canal, the conditions of that control.

Paris, August 21, 1902.

(GAUTRON,  
*The Liquidator of the Universal Company  
of the Inter-oceanic Canal.*

*Definitive settlement of the accounts of the contractors.*

Names of contractors.	Sums due after agreement.	Dates of agreements and of the approval of the agreements.	Dates and nature of the payments effected.
American Contracting and Dredging Company.	Francs. 2,279,587.70	Agreement of Dec.31,1890, prior to the law of July 1, 1893.	Payment of Jan. 10, 1891:
			Cash..... 1,500,000.00
			Turning over of dividends on 3,000 shares
			P. R. R. .... 217,037.70
			7,500 lottery bonds, at 75 francs each ..... 562,500.00
			Total ..... 2,279,587.70
Baratoux, Letellier & Co.	2,269,009.33	Agreement of Aug. 8, 1894; approved Aug. 10.	Payment of Nov. 29, 1894:
			18,270 lottery bonds, at 124.18½ francs each .. 2,268,905.63
			Cash ..... 103.70
			Total ..... 2,269,009.33

Definitive settlement of the accounts of the contractors—Continued.

Names of contractors.	Sums due after agreement.	Dates of agreements and of the approval of the agreements.	Dates and nature of the payments effected.
E. Jacob.....	Francs. 2, 126, 366. 01	Agreement of Aug. 8, 1894; approved Aug. 9.	Payment of Nov. 29, 1894: 17,122 lottery bonds, at Francs. 124.18½ francs..... 2, 126, 338. 37 Cash..... 27. 64 Total ..... 2, 126, 366. 01
Artigue Sonderegger & Co.	1, 921, 004. 88	Agreement of Aug. 14, 1894; approved Aug. 17.	Payment of Nov. 29, 1894: 15,657 lottery bonds, at 122.66½ francs..... 1, 920, 918. 18 Cash..... 86. 70 Total ..... 1, 921, 004. 88
G. Eiffel .....	7, 147, 264. 33	Adjustment of Jan. 26, 1894; approved June 29, 1894.	Payment of Nov. 29, 1894: 57,178 lottery bonds, at 125 francs..... 7, 147, 250. 00 Cash..... 14. 33 Total ..... 7, 147, 264. 33

As to Messrs. Vignaud, Barbaud, Blanleuil & Co., they claimed of the liquidation: (1) Payment for their work, 1,336,154 francs; (2) damages, 15,066,000 francs; (3) the reimbursement of the guarantee funds held by the company, 1,283,547.20 francs; altogether, 17,685,701.20 francs, and the restoration of their guarantee deposit, consisting of 37,748 francs of 3 per cent French State annuity (*rente*), with arrears.

On its side, the liquidation presented itself as a creditor of those contractors on account of failure to carry out their contracts, claiming in return a sum of 8,658,705.65 francs.

An agreement dated March 7, 1896, approved by the tribunal of commerce (judgment of March 23, 1896), and by the civil tribunal of the Seine (judgment of May 22, 1896), has put the parties into accord. The contractors have only entered into possession of their guaranty of 37,748 francs of *rentes*, and have abandoned all their other pretensions. The liquidation, on its side, renounced its claims, on condition that it should remain in possession of the back receipts obtained by it on that guarantee fund, to wit, 84,933 francs, and that it should receive the back receipts obtained by the Caisse de Deposits and Consignments on the guaranty since the day of the deposit, to wit, 188,740 francs.

This arrangement was carried into effect on June 6, 1896.

Paris, August 22, 1902.

GAUTRON,

The Liquidator of the Universal Company.

List of creditors obtaining judgments against the liquidation of the Universal Company of the Inter-oceanic Canal.

Names of the creditors.	Date of the judgments and designation of the tribunal.	Kind of indebtedness.	Amount of judgments.	Result.
<b>BONDHOLDERS.</b>				
Laurillard .....	Civil tribunal of the Seine; judgment of June 25, 1890.	20 new bonds, 1st series .....	France, 9,000.00 .....	Paid 10,681.25 francs Aug. 25, 1892.
G. Fleury .....	do .....	Interest .....	1,681.25 .....	Paid 2,001.07 francs Aug. 27, 1892.
		5 bonds, 4 per cent .....	1,665.00 .....	
		Due from sinking fund .....	29.00 .....	
		Interest .....	307.07 .....	
Veuve Mille .....	do .....	17 bonds, 5 per cent .....	7,487.50 .....	Paid Nov. 12, 1892, after an agreement reducing the debt by one-fifth, 10,606.20 francs.
		11 bonds, 3 per cent .....	8,185.00 .....	
		1 bond, 4 per cent .....	383.00 .....	
		Due from sinking fund .....	216.12 .....	
		Coupons .....	9.44 .....	
		Interest .....	2,181.50 .....	
		Total .....	13,261.56 .....	
Mlle. Joreau .....				
M. Roger .....				
M. François .....				
M. Donnadieu .....				
Héris de Vaillant .....				
M. Denoyare .....				
M. Doumic .....				
M. Pichot .....				
M. Noyelle .....				
M. Delaplace .....				
M. Laporte .....				
M. Genys .....				
M. Pilon .....				
Mme. Vve. Lepecheux .....				
M. Dubar .....				
M. Raffard .....				
M. Bonhoure .....				
Mlle. Taules .....				

*All these individual suits and the proceedings resulting from them are to-day suspended by reason of the provisions of the law of July 1, 1893. More than that, by an agreement of Oct. 18, 1894, the liquidator obtained from the bondholders, who had instituted some seizure orders and execution orders, a discharge and a desisting from their appeals, in return for the reimbursement pure and simple of the costs, fees, and outlays of the proceedings of all kinds in which they had obtained judgments against the liquidation, leaving at their charge the expenses and outlays of the proceedings in which they failed. Judgments of the first chamber of the civil tribunal of the Seine since the law of July 1, 1893, have decided that the oppositions interposed by these bondholders are without object and can have no effect.*

M. Chappellier .....					
M. Escherich .....					
Mme. Vve. Sarrafin .....					
M. Sauter .....					
Mme. Vve. Brion .....					
Mme. Vve. Petit .....					
M. Jamin .....					
DIVERS CREDITORS IN FRANCE.					
Nercam, contractor .....	Civil tribunal of the Seine; judgment of Dec. 12, 1899.	Work done and damage caused .....	Francia. 350,000. 00		Received 366,497 francs for principal and interest from the product of the immovable property, 46 Rue Camartin. Received 101,012.10 francs from the product of the sale of the immovable property on the Rue Camartin, and 90,000 francs in cash Oct. 18, 1894. By agreement of July 5, 1892, M. Marolle consented to receive 300,000 francs in payment of all accounts. This transaction was approved July 13, 1892, the payment made July 28, 1892. These sums with interests are together 4,016 francs; paid Sept. 4, 1894. The case is on appeal.
Piza Lindo & Baugouin, contractors.	Civil tribunal of the Seine; judgment of Mar. 26, 1890.	Ditching work .....	4204, 970. 76		
Marolle, civil engineer.	Civil tribunal of the Seine; judgment of May 21, 1890. judgment of June 17, 1891.	Work of surveying 250,000 hectares of land granted by Colombia.	405, 705. 00		
Muraccioti, contractor.	Civil tribunal of the Seine; judgment of Apr. 11, 1898.	Payment of account .....	3, 380. 15		
Von Berg & Co .....	Civil tribunal of the Seine; judgment of Aug. 7, 1901.	Price of excavator, transporter, and accessory implements.	6, 000. 00		
DIVERS CREDITORS IN COLOMBIA.					
Metivier-Rochet, contractor.	Tribunal of commerce of Panama; judgment of July 16, 1890.	Work .....	Peasas 200,001. 58		The liquidator having appealed from the judgment, Messrs. Metivier-Rochet offered to settle. An agreement approved by the superior tribunal of the district of Panama Sept. 13, 1890, fixed at 98,000 francs the sum to be paid by the liquidation to settle all accounts, including interest and costs; payment made Sept. 19, 1890.

<sup>a</sup> Including the amount retained as guaranty, 107,023 francs.

## List of creditors obtaining judgments against the liquidation of the Universal Company of the Inter-oceanic Canal—Continued.

Names of the creditors.	Date of the judgments and designation of the tribunal.	Kind of indebtedness.	Amount of judgments.	Result.
DIVERS CREDITORS IN COLOMBIA—cont'd.				
Tanguy, contractor ...	Tribunal of commerce of Panama; judgment of May 19, 1892.	Work of excavation; contract rescinded Jan. 8, 1888.	Pesos. 124,268.33	The liquidation settled with M. Tanguy July 28, 1892, by means of 120,000 pesos deposited on Jan. 3, 1888, with M. H. Ehrmann as guaranty of the compensation which might be allowed. Transaction approved by the superior tribunal of Panama July 25, 1892.
Schuber Bros .....	Superior tribunal of Panama; judgment of July 13, 1899.	Occupation by the company of a part of the property of said Juan Diaz Caballero.	28,839.67	See special note.
Domingo Diaz .....	Superior tribunal of Panama; decision of June, 1899.	Occupation of a part of the property "Huerta del Gallo."	(a)	Do.
Icaza (the heirs) .....	Civil tribunal of the first district of Panama; judgment of Sept. 6, 1897.	Condemnation for the benefit of the company of 2 hectares 42 area of the property "Cerro de San Juan," belonging to their father.	41,225.00	Do.

a 2 square meters occupied.

Certified to be correct, August 22, 1902.

GAUTRON,  
The Liquidator of the Universal Company.

*Statement of judgments, attachments, and injunctions against the Universal Company and the liquidator.*

**STATEMENT OF BONDHOLDERS WHO BEGAN PROCEEDINGS AGAINST THE LIQUIDATION TO SECURE REIMBURSEMENT FOR THEIR BONDS, BUT DID NOT OBTAIN JUDGMENTS.**

Name of bondholder.	Num- ber of bonds.	Nature of bonds.	Cost of issue.	Sums claimed.			Total amount of claims.	Remarks.
				For the value of bonds.	For the amount due from sinking fund.	For coupons.		
M. Pichot.....	671 280	3 per cent ..... 4 per cent .....	France 285.00 383.00	France 191,235.00 93,240.00	France 10,051.58 1,400.00	France ..... .....	France. 285,926.58	(Service made Feb. 4, 1893. Affair taken from the roll of the tribunal (suppressed) Oct. 31, 1896.
M. Noyelle.....	33	.....do .....	383.00	12,654.00	190.00	.....	12,844.00	Service made Feb. 6, 1893. Affair taken from the roll of the tribunal Oct. 31, 1895.
M. Delaplace .....	10 10	New, first series ..... New, second series .....	450.00 440.00	4,500.00 4,400.00	1,046.60 753.50	..... .....	10,700.10	(Service made Feb. 9, 1893. Affair taken from the roll of the tribunal Nov. 15, 1896.
M. Laporte .....	15 3	3 per cent ..... New, second series .....	285.00 440.00	4,275.00 1,820.00	300.00 300.00	..... .....	6,195.00	(Service made Feb. 6, 1893. Affair taken from the roll of the tribunal Nov. 15, 1896.
M. Genys .....	5 6 a 2	5 per cent ..... 3 per cent ..... Lottery bonds.....	437.50 285.00 860.00	2,187.50 1,425.00 720.00	13.05 74.90 .....	49.10 11.75 16.25	4,497.55	(No judgment. Affair taken from the roll of the tribunal Nov. 10, 1896.
M. Pilon.....	2 3	4 per cent ..... New, first series .....	383.00 450.00	666.00 1,350.00	11.94 313.80	15.86 .....	2,357.60	Service made Mar. 24, 1893. No judgment.
				2,016.00	825.74	15.86		



*Statement of judgments, attachments, and injunctions against the Universal Company and the liquidator—Continued.*

STATEMENT OF BONDHOLDERS WHO BEGAN PROCEEDINGS AGAINST THE LIQUIDATION TO SECURE REIMBURSEMENT FOR THEIR BONDS, BUT DID NOT OBTAIN JUDGMENTS—Continued.

Name of bondholder.	Num- ber of bonds.	Nature of bonds.	Cost of issue.	Sums claimed.			Total amount of claims.	Remarks.
				For the value of bonds.	For the amount due from sinking fund.	For coupons.		
Mme. Vve. Lepêcheux.	2	New, first series .....	France, 450.00	France, 900.00	France, 209.20	France, 1,129.80	France, 2,239.00	Service made Feb. 8, 1893. No judgment.
M. Dubar.	12 11 5 a9	4 per cent .....	383.00	3,995.00	60.00	.....	.....	{ Service made Feb. 8, 1893. No judg- ment. <sup>a</sup>
		New, first series .....	450.00	4,950.00	1,150.60	.....	.....	
		New, second series .....	440.00	2,200.00	576.75	.....	.....	
		Lottery bonds claim- ed wrongly for 400 franca.	360.00	3,600.00	.....	.....	16,333.35	
M. Raffard	24 8	3 per cent .....	285.00	14,745.00	1,587.35	.....	.....	{ Service made Feb. 12, 1893. No judgment.
		New, first series .....	450.00	6,840.00	359.52	.....	.....	
		.....	.....	1,350.00	313.80	.....	.....	
		.....	.....	8,190.00	673.32	.....	8,863.32	
M. Bonboure	29 148 18 15 a5 a20	5 per cent .....	437.50	12,673.00?	.....	.....	.....	{ Service made Feb. 14, 1893. No judg- ment. <sup>b</sup>
		3 per cent .....	285.00	42,180.00	.....	.....	.....	
		New, first series .....	450.00	8,100.00	2,000	.....	.....	
		New, second series .....	440.00	6,200.00?	.....	.....	.....	
		New, third series .....	480.00	2,300.00	.....	.....	.....	{ Service made Feb. 14, 1893. No judg- ment.
		Lottery bonds .....	360.00	7,200.00	.....	.....	80,668.00	
		.....	.....	78,658.00	2,000	.....	.....	
		.....	.....	8,750.00	52.20	.....	.....	
Mlle. Tanies	20 70 39	5 per cent .....	437.50	19,350.00	1,046.60	.....	.....	{ Service made Feb. 14, 1893. No judg- ment.
		3 per cent .....	285.00	15,600.00	2,928.65	.....	46,326.45	
		New, second series .....	440.00	44,800.00	4,029.45	.....	.....	

	10	3 per cent	2,850.00	149.80		{ Service made Feb. 15, 1893. Not put on the roll of the tribunal.
M. Chappellier	50	5 per cent	437.50	130.50		
	40	New, first series	450.00	4,184.00		47,189.80
			42,725.00	4,464.80		
			13,932.00	1,855.03		
M. Estagerie	34	Divers bonds not specified.				19,047.03
Mme. Vve. Sarrazin	40	5 per cent	437.50	104.40		21,645.40
M. Sessler						
Mme. Vve. Brion						
Mme. Vve. Petit						
M. Jamain						
Total						576,820.68

The lottery bonds do not constitute titles to indebtedness against the liquidation, except as to the coupons; so also the new bonds, third series.

**Certified to be correct.**  
**Paris, August 28, 1902.**

**GAUTRON,**  
*The Liquidator of the Universal Company.*

*Statement of judgments, attachments, and injunctions against the Universal Company and the liquidator—Continued.*  
 STATEMENT OF BONDHOLDERS WHO OBTAINED CONDEMNATIONS AGAINST THE LIQUIDATION OF THE UNIVERSAL COMPANY OF THE INTEROCEANIC CANAL.

Name of bondholder.	Number of bonds.	Nature of bonds.	Cost of issue.	Value of bonds.	Due from sinking fund.	Amount of judgments.	Date of judgments.
Mlle. Joreau.....	265 20 40 40 40	4 per cent ..... 5 per cent ..... New, first series..... New, second series..... 3 per cent .....	France. 333.00 437.50 450.00 440.00 286.00	France. 88,246.00 8,750.00 18,000.00 17,600.00 11,400.00	France. 1,682.05 52.00 4,184.00 3,012.00 595.20	France. 158,424.25	Judgment of Jan. 26, 1883, requiring, moreover, the payment of interest dating from Dec. 14, 1888, according to the law.
M. Roger .....	36 8	.....do..... 5 per cent .....	285.00 457.50	10,280.00 8,500.00	539.28 20.88	14,820.16	Do.
M. François.....	40 42 10	.....do..... 3 per cent ..... New, second series...	457.50 286.00 440.00	17,500.00 11,970.00 4,400.00	104.40 628.16 753.00	86,956.56	Do.
M. Donnadieu .....	241 10 15	5 per cent ..... 3 per cent ..... New, first series .....	457.50 286.00 450.00	105,487.50 2,850.00 6,750.00	628.01 149.80 1,569.00	117,885.31	Do.
M. Bougala .....	30	New, second series....	440.00	115,087.50 18,200.00	2,347.81 2,259.00	16,459.00	Do.

M. Debyrs .....	260	5 per cent .....	437.50	112,750.00	678.60		
	20	4 per cent .....	333.00	8,490.00	114.00		
	20	New, first series .....	450.00	9,000.00	2,092.00	132,300.00	Do.
Heirs of Vaillant .....	96	New, second series .....	440.00	129,410.00	2,890.00		
	2	New, second series (amortized or sunk) .....	1,000.00	43,120.00	7,379.40		
				2,000.00	.....	52,499.40	Do.
M. Denovarro .....	1	New, first series .....	450.00	45,120.00	7,379.40		
Consorts Doumle .....	10			450.00	104.60	554.60	Do.
	16	5 per cent .....	437.50	4,375.00	26.10		
	12	8 per cent .....	285.00	4,560.00	239.68		
	12	4 per cent .....	333.00	3,996.00	71.64		
	27	New, first series .....	450.00	12,150.00	2,824.20		
	20	New, second series .....	440.00	8,800.00	1,506.00	38,549.62	Judgment of Mar. 23, 1893.
				33,881.00	4,667.62		
Salleix Labolge .....	29	New, second series, served pleadings for .....	440.00	12,536.70	725.00	13,261.70	Judgment of Jan. 26, 1893. Not served upon the liquidation.
Total .....						573,109.60	

Certified to be correct.  
Paris, August 30, 1902.

GAUTHRON,  
The Liquidator of the Universal Company.

## EXHIBIT 10.

EXTRACTS FROM REPORTS OF THE LIQUIDATOR SHOWING  
LITIGATION IN FRANCE AND PANAMA, PLEDGES, SETTLEMENTS WITH CONTRACTORS, ETC.

[No. 1, third part.]

MANAGEMENT OF M. BRUNET, FEBRUARY 4, 1889, TO MARCH 8, 1890.

M. Brunet came into office on the 4th of February, 1889. On this date the situation of the enterprise on the Isthmus was most critical. The liquidator found it impossible to continue the works, the sudden stoppage of which, the sending away of several thousands of workmen might bring about serious troubles and irreparable disasters. The contractors could not leave their workshops and reconcile their workpeople from one day to the next, and they were not disposed to give up these workshops and the *matériel* until after their respective situations had been definitely settled.

In short, the general state of public opinion and the disposition manifested in the financial world at the commencement of 1889 was of such a nature as to justify the liquidator in thinking that the transfer of the work to a new company was not absolutely impossible. It was, therefore, necessary to proceed with a certain amount of prudence and not definitively compromise, by too prompt action, the whole future of the undertaking.

On the other hand, if this favorable hypothesis was not realized, it was the duty of the liquidator to attempt to take up again and continue the work by means of the formation of a company of construction.

The work already done, the considerable quantity of *matériel* brought to Colombia and in place for working, had an incontestable value if used to continue the excavation of the canal; it would have been quite a different matter had the scheme been definitively abandoned. Also, the works must be taken care of, the *matériel* preserved on a line of plants of 75 kilometers. For this resources were deficient. A seizure made by one of the contractors on the Isthmus, the company of public works and constructions, of money in the hands of two companies in Paris, debtors of the Panama Company, made sums of money which would have been very useful to the liquidator unavailable.

The liquidator suddenly found himself deprived of large capital which he expected to have at Panama, and on which he had counted to pay the necessary expenses on the Isthmus. About the 10th to the 15th of February, 1889, the directors of the Panama Company, contrary to the instructions of the liquidator, had paid, under the influence of a panic and exaggerated fears, to all the employees working on the Isthmus, three-quarters of the indemnity in proportion to the length of their service which the company were liable for in the case of dismissal of the workmen. The total amount of the payments thus made was 1,582,000 francs. However interesting may have been the situation of those employees,

these payments still left remaining the obligation to bring back to France these workmen and were untimely, occurring as they did just at the moment when the liquidator had scarcely at his disposal the necessary funds to avoid the whole abandonment of the scheme and the disastrous consequences of that.

On the other hand, the liquidator could not attempt in the future to form a company for the accomplishment or finishing the canal without having previously caused the formation of a commission of examination which would have for its task to render an account of the value of the work accomplished, of the machinery, materials, etc., and give an opinion as to whether the work could be accomplished, and under what conditions. It was necessary to provide for the expenses of such an investigation and to take steps during it and afterwards, if it should be necessary, to provide for the protection of the work already done and for keeping in condition the machinery, etc.

Above all it was important to avoid any sudden interruption of work on the Isthmus. After the 9th of February, 1889, the liquidator had entered into, with four large contracting firms—namely, MM. Artigue Sonderegger & Co., Baratoux, Letellier & Co., M. Eiffel, Jacob—the agreements and pledges (*nantissements*) prepared by the temporary administrators and authorized by the tribunal.

The same day he gave them bills of exchange representing the amount they had earned since the suspension of payment up to the 9th of February. The work which was to follow was also to be settled by means of bills accepted by the liquidation.

The 18th of February and the 23d of March, 1889, the liquidator entered into identical arrangements with M. Slaven, president of the American Contracting and Dredging Company, in that case the pledge consisting of the deposit of 3,000 shares of stock of the Panama Railroad Company, which pledge was made in the American manner.

By means of these successive agreements the work has been continued on the Isthmus up to various dates, reaching from the 15th of March to the 15th of May, 1889.

But the liquidator had another mission to fulfill. In appointing him the civil tribunal had given him "the most extensive powers, notably to cede or contribute to the new company all or part of the company's assets, to make or ratify with the contractors of the Panama Canal all agreements, having for their object to assure the continuation of the work."

On the supposition that the work was to be soon resumed, as on the supposition that the liquidator could only effect the establishment of a company to accomplish it, it was of the highest interest to disengage the liquidation from contracts which had been entered into with burdensome conditions, with a view to assure the very prompt construction of the canal with locks, and which would bear heavily upon any company disposed to undertake the continuation of the work. Moreover, the liquidator was not able to repossess the workshops and machinery, etc. (*matériel*), which had been turned over to the contractors by the com-

pany except after having arranged the respective claims of these contractors.

The conditions on which those arrangements were made varying according to the original arrangement with each contractor it is proper to consider them separately.

It must be remembered that all the canceling of contracts had taken place without the liquidator's according to the contractors any indemnity for loss of profits or other causes.

#### COMPANY OF PUBLIC WORKS AND CONSTRUCTIONS.

The company of public works and constructions had remained adverse to all the arrangements made between the provisional administrators and the other large contractors. They had brought several suits both before and after the suspension of payment.

1. On the 6th of September, 1888, they summoned M. Ferdinand de Lesseps and the council of administration of the Panama Company for damages before the tribunal civil of the Seine on account of certain expressions in the report presented on the 1st of August to the ordinary general meeting of stockholders.

2. On the 7th of September, 1888, they summoned the Panama Company before the tribunal of commerce of the Seine to be condemned to the guarantee of the sum of 609,139 francs claimed from the company of public works and constructions by MM. E. Jacquemin and associates, sub-contractors.

3. On the 13th of October, 1889, the society of public works and construction raised the figure of the preceding demand to 13,335,903.55 francs. They also demanded, in view of the situation of the company, to be guaranteed by it against the claims of subcontractors, and claimed the reimbursement of expenses occasioned by the stopping of the works.

4. The canal company, acting on the advice of its provisional administrators and administrative council, on the 7th of January, 1889, summoned the society of public works and construction before the tribunal of commerce for payment of 8,702,756.30 francs.

6. However, under date of the 13th of December, 1888, the society of public works and construction had made seizures by way of garnishment, limited finally to 2,000,000 francs by an order of the president of the civil tribunal, of debts owing to the Panama Company by two credit companies. Thus, as has been said above, this opposition paralyzed resources of which the liquidator had great need.

On the 28th of February, 1889, there took place between the liquidator and the company of public works and constructions a transaction on the following basis:

1. All accounts without exception between the parties are to be settled by allowing to each of them the sums held by them at the date of the agreement.

2. The parties are to desist from all suits against each other.

3. All previous agreements are revoked.

4. The plants with all the machinery, etc., the machinery on hand for replacing the worn or broken machinery, the fittings and supports of the machinery, the dwelling houses, the other buildings, magazines, etc., existing at the said plants are to be turned over to the liquidation in the condition in which they may be and such as they shall be at the time of the turning over.

5. The final deficiency as to articles to be furnished, so far as they have been furnished, or are yet to be furnished by the canal company, for the establishments of the company of public works and constructions shall be settled at a sum arranged in view of the present condition of the canal company, the articles to be turned over to the canal company in full ownership.

6. The company of public works and constructions charges itself with the settlement of the accounts of Jacquemin, and desists completely from the demand which it has made against the company as guarantor.

7. The company of public works and constructions likewise renounces all claim against the company on account of the ultimate claims of its workmen.

8. The canal company will reimburse the amount deposited as security and the guaranty retained, which belonged to the company of public works and constructions.

9. The company of public works and constructions withdraws from all the opposition it has instituted.

10. The parties reciprocally abandon all rights of recovery and claims.

This agreement has been approved by a judgment of the Tribunal of the Seine, dated 5th of March, 1889; registered on the 19th of the same month.

CONCERN OF VIGNAUD, BARBAUD, BLANLEUIL & CO.

At the time of the suspension of payment the position of these contractors was such that it was necessary for the canal company during several months to provide for the payment of their workmen.

On account of the condition of the company, the provisional administrators were compelled to limit, and finally to stop, that favor. On the 23d April, 1889, Messrs. Vignaud, Barbaud, Blanleuil & Co. proceeded against the liquidator to have their contracts annulled, for the payment of 16,000,902 francs 8 centimes, and for the reimbursement of the sum of 2,265,000 francs, representing their security and money retained as guaranty. The liquidation has made a cross demand, amounting to 8,658,705 francs 65 centimes.

During the course of these proceedings the company of Vignaud, Barbaud, Blanleuil & Co. has been thrown into judicial liquidation by a judgment of the tribunal of commerce, dated May 4, 1889.

The tribunal has converted the judicial liquidation into a bankruptcy proceeding, by judgment of June 15, 1889.

M. Mauger, the bankruptcy syndic, has revived the suit on June 26, 1889, and submitted propositions of settlement. The negotiations had not terminated at the time of the resignation of M. Brunet.



Accordingly, the suit is still pending before the civil tribunal.

The liquidator has since made definitive arrangements with the five contracting concerns who, on the request of the provisional administrators and afterwards his own request, consented to continue the works on the Isthmus. These five concerns are MM. Artigue, Sonderegger & Co.; Eiffel; Baratoux, Letellier & Co., Jacob, and The American Contracting and Dredging Company.

#### CONCERN OF ARTIGUE, SONDEREGGER & CO.

On the 25th of April, 1889, the liquidator canceled the contract with Messrs. Artigue, Sonderegger & Co. on the following conditions:

1. Messrs. Artigue, Sonderegger & Co. abandon all their rights to damages of any kind that may be due from the company.
2. The canal company recovers all the machinery, etc., and accessories in the condition in which they may be found, and discharges the concern from all responsibility for them.
3. The ultimate arrangement as to the work actually performed shall be arranged in conformity with the contracts. And to determine the quantity exactly of cubic meters excavated, there shall be a joint measurement on the ground.

According as the results of that verification shall give a cubic measure greater or less than that actually paid for by the company, there is to result a debit or credit for Messrs. Artigue, Sonderegger & Co., who are to pay all expenses.

The settlement shall be by bills (*traites*).

4. All preceding agreements, with the exception of the transaction constituting the pledge of 9th of February, 1889, are annulled and canceled.

This agreement has been executed; the measurement on the ground has taken place and the contracting concern has been found to be a debtor for the sum of 319,264.66 frs. which it has paid in bills on the 26th August, 1889.

#### CONCERN OF M. EIFFEL.

The definitive arrangement with M. Eiffel took place on the 11th of July, 1889. After an examination of their respective claims, the parties agreed upon the following points:

1. The two parties hold themselves free of all engagements, under reserve of the regulation provided in No. 4 hereinafter and under the benefit of the restitution which is hereinafter explained.

M. Eiffel has received from the company allowances on account and advances, to be repaid for the putting in place and furnishing of the things necessary for the construction of 8 locks.

These allowances and advances were to cover not only the value of the supporting works and the articles but also the expenses attending their preservation and alteration up to the completion of the canal work if the canal work had been carried to a conclusion. They comprise, besides, a part of the remuneration of the contractor up to the finishing of the locks.

It has resulted from reports made from the Isthmus, by order of the liquidator, that M. Eiffel has complied with his engagements so far as concerns the installations and the articles necessary for the construction of the 8 locks, but the interruption of the work put a stop to the expenses hereinabove mentioned and left the contractor a portion of the benefits which did not arise from a finished work.

In these circumstances it appeared just to the liquidator to make M. Eiffel restore a part of the allowances. This restitution has been fixed by agreement at the sum of 3,000,000 francs, which M. Eiffel has paid to the liquidation; that is to say:

	Francs.
In money .....	2, 280, 082
In notes .....	300, 000
By abandoning the money retained as guaranty by the company .....	419, 918
	<hr/> 3, 000, 000

2. M. Eiffel turns over to the liquidator all the large and small matériel, the machines, constructions, implements, supplies of all sorts, as well as the tracks, dams, supporting works, houses, buildings, magazines, sheds, etc., all of these in the condition in which they may be on the Isthmus, without any exception or reservation.

M. Eiffel puts at the disposition of the liquidator in the condition of manufacture in which they may be the materials of all kinds destined for the locks, and at present in the plants on the Isthmus, or in the shops and factories of M. Eiffel and the shops of those furnishing them to him in France.

The inventory of the matériel shall be delivered within eight days to the liquidator, who will take charge of said things.

M. Eiffel will remain chargeable for one year with the expense for rent of the ground on which these materials are or may be placed.

M. Eiffel becomes personally responsible for all claims which may be made by those furnishing the materials to him on his order; he can not, on this ground, have any recourse against the company.

3. The company, which has already taken charge of the material and installations in the condition in which they were found, gives M. Eiffel a release of responsibility for them; there shall be settled a definitive arrangement as to the work which has been done by M. Eiffel.

4. The debit or credit which may result therefrom for M. Eiffel will represent the settlement of all accounts. The settlement shall be in bills returned by M. Eiffel, or in acceptances by the liquidator if M. Eiffel is found to be a creditor.

5. The liquidator will restore within three days after the judgment of confirmation the bills and values belonging to M. Eiffel either as guaranty retained or as security.

6. The pledging of February 9, 1889, is continued in force.

7. The present agreements will be definitive after they have been approved by the tribunal at the instance of the liquidator.

8. Each party shall pay half of the expenses of registration and approval by the tribunal.

This agreement was approved by a judgment of the tribunal of the Seine dated July 31, 1889, registered the 6th of August following.

In execution of article 4 of this convention the status of the work done by the concern has been established by the parties acting in accord, and M. Eiffel has been recognized as a creditor to the amount of 853,896.75 francs, which has been paid him in bills accepted by the liquidator.

CONCERN OF BARATOUX, LETELLIER & CO.

The arrangement with Baratoux, Letellier & Co. has been concluded on the 23d October, 1889, on the following conditions:

1. The parties are held released from all engagements whatever and renounce on both sides all claims;

2. The contractors abandon to the canal company a part of the matériel and installations belonging to them;

3. The company takes charge in the condition in which they are found all matériel and installations which belong to it and releases the contractor from his responsibility;

4. The definitive settlement of the amount of work performed by the contractors has resulted in a credit of 433,585.72 francs in favor of the contractors;

The liquidator accepts, up to that amount, bills drawn by MM. Baratoux, Letellier & Co.

5. The pledge of February 9, 1889, is continued in force;

6. All accounts are respectively closed and ended;

7. The agreement will be definitive after approval by the tribunal.

This convention has been approved by a judgment of the civil tribunal of the Seine, dated November 20, 1889, registered December 7 of the same year.

CONCERN OF JACOB.

The dissolution of the contract with the Jacob concern could not be effected by M. Brunet on account of the number and large amount of the claims presented by the contractor.

The examination of these claims was commenced by M. Brunet before he ceased to act, but their settlement remained in suspense and is being arranged at present.

AMERICAN CONTRACTING AND DREDGING COMPANY.

The settlement of the affairs of this concern requires waiting for an expert examination now going on to determine the cubic excavation done by them in a limited section of the canal.

This controversy was not arranged by M. Brunet during his incumbency, and is still under discussion.

Besides these five great concerns there existed contracts of less importance, the definitive settlement of which had not been accomplished on

account of disagreements between the company and the contractors. These are the contracts with Nercam and Piza, Lindo, Baudouin & Co.

NERCAM CONCERN.

M. Nercam, charged in the month of January, 1886, with works of derivations to the canal, demanded the dissolution of his contract, the payment for the work executed, and compensation for the injury which had been caused him, to the total amount of 1,200,000 francs.

By judgment of December 11, 1889, the civil tribunal of the Seine has declared the contract dissolved and has condemned the liquidation to pay to this contractor, for the two chief reclamations, a total sum of 350,000 francs, but to accord to the liquidator a delay of a year to free himself.

PIZA, LINDO & BAUDOUIN CONCERN.

An identical solution has intervened for these contractors, charged like the preceding with works of derivations on the canal, who claim 307,023 francs, though on March 26, 1890, the civil tribunal of the Seine pronounced the dissolution of the contract and condemned the liquidation to pay to that concern a sum of 204,970.76 francs, in which total were 107,023 francs, the amount of the retained guaranty, and gave the liquidator a year in which to settle.

The retaking of matériel by the agents of the liquidation on the Isthmus and the restoration of the plants have given rise to no complication.

---

[Extract from second report of the liquidator.]

On the 2d of December, 1890, a seizure was made, or attachment in the hands of the Lottery Bond Company, of prizes due and to become due to the liquidation upon bonds held by that company. \* \* \*

The individual proceedings taken by several shareholders created many difficulties, which would only increase if a solution was not arrived at without delay.

On the other hand recent publications by journals in America and Colombia revealed the fact that the United States, knowing how much more rapidly and inexpensively the Panama Canal can be built than any other, was awaiting the moment when it could get the benefit of the work commenced and bring it to a conclusion with small expense without taking any account of the efforts and the sacrifices previously made.

The Republic of Colombia was commencing to regard with a less hostile eye the American views.

The civil tribunal of the Seine, doing what an extraordinary general meeting of the stockholders of the Panama Company had not been able to do, since such a meeting had been found to be impossible, gave the

liquidator the most extensive powers—"notably to cede or contribute to any new company the whole or part of the company assets."

In some months, perhaps in some weeks, the difficulties experienced by the liquidator would have increased to such a point as to render impossible the execution of this mission (*mandat*).

It was necessary, then, quickly to arrive at one of two solutions:

The constitution of a new company for the construction of the canal, or, all hope of recommencing the work being finally abandoned, the liquidation to be finished (*la liquidation effective*). Assuredly, notwithstanding the expressed wishes of a great many bondholders, it was not to be expected that Parliament would guarantee or patronize an undertaking which is of a private character. \* \* \* It did not suit the Government or Parliament to cause hopes to arise which might once again transform themselves into cruel deceptions.

But it was not to be overlooked that there exists an amount of material, machines, etc. (*un matériel*), which was very important, and which has no value if the work of the canal is not resumed, and a total of works, constructions, materials, workshops, which return to Colombia if there should be a complete abandonment of the enterprise unhappily interrupted.

#### THE JACOB CONCERN.

M. Jacob claimed from the liquidation for damages resulting from the breach of his contract: The concession to other concerns or execution by the company itself of works which should have been given to him; failure to receive in due time or condition matériel to be furnished; delay in the execution of certain dredgings; payment of bills for articles intended to replace others, etc.; the stopping of the work by the fault of the company; a material error in accounts; loss by exchange of money, and finally for expense of preservation and protection of matériel, a sum of 8,826,973.22 francs.

The liquidator considered that all these demands should be resisted. It appeared to him after a revision of the invoices that there was due to the concern only the sum of 553,065.50 francs. There was to be added to that sum the guaranty in the safe of the company and belonging to M. Jacob, 250,000 francs.

As a result a transaction took place between the liquidator and M. Jacob on July 25, 1890.

The definitive statement of the sum remaining due to the latter to settle all accounts has been arranged at 803,065.50 francs.

The liquidator has accepted, to that amount, bills drawn by M. Jacob and bearing 3½ per cent interest, the said notes guaranteed by special pledge (*nantissement*) of the shares of the Panama Railroad Company already turned over to the contractor.

M. Jacob has abandoned to the liquidation all the matériel, installation and construction implements, movable property, and supplies of whatever kind belonging to him on the Isthmus.

The parties have reciprocally released each other from every engagement and renounced all ulterior claims. This convention has been approved by a judgment of the civil tribunal of the Seine, dated July 30, 1890.

MÉTIVIER-ROCHET CONCERN.

In the course of a controversy between the contractors and the company the latter has placed in the hands of MM. Ehrmann & Co., bankers at Panama, a guaranty of 100,000 piasters.

As a result of an expert examination the liquidation was condemned on July 16, 1890, by the tribunal of commerce of Panama to pay the contractors 200,001 piasters 53 centimes.

The liquidator having appealed from that decision, MM. Métivier and Rochet made offers of settlement. It has been agreed that the liquidator is to pay, to settle all accounts, including interests and expenses, 98,000 piasters, and withdraw from the hands of MM. Ehrmann & Co. 2,000 piasters. This agreement was approved the 13th of September, 1890, by the superior tribunal of the district of Panama and has been executed.

AFFAIR OF THE AMERICAN CONTRACTING AND DREDGING COMPANY.

Mr. H. Slaven, representing this concern, claimed for work performed since the dissolution of the Panama company the payment for which was guaranteed by titles subscribed the 8th of January, 6th of March, 11th of June, 1889, and by a pledge of

	Francs.
3,000 shares of the Panama Railroad stock .....	2, 579, 510. 56.
Interest.....	132, 091. 97
His guaranty retained.....	300, 000. 00
In addition, on account of a litigation prior to the dissolution of the Panama company .....	600, 000. 00
	<hr/>
	3, 611, 602. 53

At the end of December, 1890, the obligations subscribed and several times renewed not having been paid when due, Mr. H. Slaven manifested his intention of realizing on his pledge.

The importance was realized of maintaining in the hands of the bondholders the ownership of the shares in the American Railway; inspired with this thought, the liquidator sought means to set free the 3,000 shares held by Mr. H. Slaven.

By the terms of an agreement of the 31st of December, 1890, executed on the 10th of January, 1891, the liquidator turned over to Mr. H. Slaven:

	Francs.
In money and dividends received on the Panama Railroad shares .....	1, 717, 037. 70
7,500 lottery bonds at their value on January 10, 1891.....	562, 500. 00
	<hr/>
	2, 279, 537. 70

Mr. H. Slaven has surrendered to the liquidation the obligations which he has in his hands and the 3,000 shares of railroad stock and the parties have renounced all claims.

Admitting, which is improbable, that the 7,500 lottery bonds would have been realized at 75 francs, this agreement resulted in the abandonment by Mr. H. Slaven of a sum of 1,332,064.83 francs of his pretensions.

#### MAROLLE AFFAIR.

On the 20th of March, 1889, M. Marolle, civil engineer, to whom had been confided the admission of proceeding in concurrence with two Colombian engineers to the work of measuring, marking, and platting of the 250,000 hectares of land conceded to the Panama Company in execution of the law of concession of 18th of May, 1878, sued the liquidation for payment of—

	Francs.
1. The second half of the sum he claimed to be due to him for his services.....	405, 705. 00
2. Payment for a supplementary measurement not contemplated by the agreement with the company.....	205, 313. 75
	611, 018. 75

By judgment of the 21st of May, 1890, the tribunal of the Seine has disallowed the second claim of M. Marolle and has suspended his claim for payment, giving the liquidator four months in which to examine and have the Colombian Government examine the plats made by Marolle, and has condemned the liquidation to pay M. Marolle provisionally 250,000 francs, giving him until December 31, 1890, to make payment. At the expiration of that suspension M. Marolle demanded of the tribunal the execution of the judgment of the 21st of May, 1890, and the payment of his credit, namely, 405,705 francs. The liquidator claimed that the condemnation of the 21st of May, 1890, was only conditional; that the condition, that is to say, the delivery of exact plats prepared in conformity to the requirements of the Colombian laws and signed by the two Colombian engineers, had not been complied with.

The tribunal, by judgment of June 17, 1891, held that the matter was *res judicata* and condemned the liquidator to pay M. Marolle the balance of his credit, "but only on the day on which M. Marolle shall have given him possession of plats signed by the two official colleagues and complying with the conditions required for submission to the approval of the Colombian Government."

This putting into possession has not taken place.

#### NERCAM AFFAIR.

The civil tribunal of the Seine, by judgment of December 11, 1889, condemned the liquidation to pay M. Nercam, former contractor of the Panama company, the sum of 305,000 francs for work and damages, and gave the liquidator a year in which to pay.

At the expiration of that time the heirs and representatives of M. Nercam, who had inscribed a mortgage under the judgment upon the immovable property in the Rue Caumartin, proceeded to the seizure of that immovable, which was already effected by several other judicial mortgages.

A judgment of March 23, 1891, having converted the sale upon seizure into a sale upon judicial publication, the immovable property was put up for sale the 13th of June, 1891, at the fixed minimum of 1,500,000 francs, and did not find a purchaser. A new offer was made at the reduced price of 1,000,000 francs without resulting in bids on the 12th of August, 1891, and the affair was postponed. The mortgage creditors showed great impatience and a new offer of sale is to be expected soon.

**AFFAIR OF LAURILLIARD, FLEURY, AND OTHERS.**

Some few bondholders of the Panama Company have obtained before the justice of the peace in some instances and before the civil tribunal of the Seine judgments which have condemned the liquidator to pay them the amounts of their coupons overdue and the amount of their bond.

The liquidator has solicited and obtained from these tribunals suspensions, during which he hoped to realize combinations which by improving the fate of the bondholders might perhaps do away with the personal feeling which has been shown in the prosecutions.

Events have not permitted the liquidator to attain that end before the expiration of the suspensions accorded by the tribunals, and two bondholders have proceeded successively to the attachment of movables of the liquidation, lottery bonds not issued, and a sum of 15,081.50 francs in money.

The liquidator instituted before the court a demand to have declared void these different seizures of movables which constitute the necessary implements of the liquidation, on sums declared unseizable by a statute, on property which the liquidator alone has the power to negotiate.

These proceedings are pending.

The liquidator has considered it his duty to defend step by step and to the last extremity the assets of the liquidation against proceedings by individuals, and not to contribute to have those assets become the prize of the race course and be absorbed by certain creditors whose situation enables them to make advances, to the detriment of all the others.

Further reference will be made hereafter to the situation created by these isolated proceedings and to the necessity of getting them disengaged.

**AFFAIR VIGNAUD, BARBAUD, BLANLEUIL, & CO.**

The action between this concern and the liquidation is still pending.



## VARIOUS PROCEEDINGS IN COLOMBIA.

Various proceedings are still pending in Colombia; the controversies in court permit one to hope they can be regulated in France by means of transactions which will be submitted to the confirmation of the civil tribunal of the Seine; as the others before the judges in Colombia conform to a legislation and a procedure very different from ours, the liquidator can not anticipate what will be the issue of them.

---

[Third Report of the liquidator.]

The third report of the liquidator (made after the Parliament had been induced to pass the act of July, 1893, and after the formation of the new company had begun) contains the following:

The litigation has had extensive progress in the period between November 12, 1891, and July 1, 1893, the date of the promulgation of the law concerning the liquidation. I consider it my duty to give here, as in my preceding reports, an exposition of these matters.

NERCAM AFFAIR.<sup>a</sup>

At the auction of August 12, 1891, the immovable property of the Panama company, No. 46 Rue Caumartin, Paris, did not find a purchaser at the minimum price of 1,000,000 francs. It was again offered for sale at the the minimum of 800,000 francs, without result, on the 9th of December, 1891. Finally on February 13, 1892, M. Jules Jaluzot became the purchaser for 600,050 francs.

A settlement was made among the mortgage creditors as to the said sum of 600,050 francs, and resulted in a friendly arrangement, as the result of which several debts of the company have been entirely extinguished.

These are those of: (1) M. Fleury; (2) M. Nercam, suitor; (3) M. Ehrmann, transferee of a part of the Nercam debt; (4) MM. R. T. Sonderegger & Co. (contract as to work at Bohio-Soldado).

Finally, Messrs. Baudouin and Piza Lindo, admitted for a credit of 208,721.59 francs, received only a sum of 101,079 francs.

AFFAIR OF VIGNAUD, BARBAUD, BLANLEUIL & CO.<sup>a</sup>

The situation has not changed.

AFFAIR MAROLLE.<sup>a</sup>

This matter has been settled.

Carrying out the provisions of the judgment of June 17, 1891, that is to say, the turning over by M. Marolle of plans signed by his two official colleagues, and conforming to the conditions necessary for

---

<sup>a</sup> See of Second Report.

submission to the approval of the Colombian Government, M. Marolle has claimed the payment of his credit, that it is to say, 405,705 francs. On July 5, 1892, there took place between M. Marolle and M. Monchicourt a transaction by the terms of which the liquidator agreed to pay to M. Marolle, after approval of such agreement by the court, a sum of 300,000 francs to settle all accounts.

This transaction was approved by judgment of the council chamber of the court dated July 13, 1892, and has been executed by payment to M. Marolle on the 28th of the same month.

#### VARIOUS PROCEEDINGS IN COLOMBIA.<sup>a</sup>

*Trufley transaction.*—Among other proceedings brought before the Colombian tribunal against the Panama company, or the liquidator, eight have been terminated by a transaction concluded at Paris with M. Trufley, representing the various parties interested.

These affairs were of different kinds; they consisted:

1. In demands in regulation of accounts and indemnities of canceled contracts by the contractors or work people of the enterprise, Brochet & Giani, Gay, Papis, Panzani;

2. In a demand for indemnity, introduced by an agricultural and industrial society called Playa de Flor, on account of the loss of a sloop belonging to it;

3. Finally, in a demand for indemnity on account of dismissal made by an agent of the company named Pellissier, and by the widow of another agent, Mme. Girod.

The demands of the contractors and workmen and of the Playa de Flor Company were stated in piasters, and amounted to a total of 919,601 piasters. Those of M. Pellissier and Mme. Girod, stated in francs, represented the sum of 8,333 francs. After a transaction, dated March 11, 1892, all these proceedings have been terminated by a payment consented to by the liquidator of a round sum of 120,000 piasters, that is to say, 444,000 francs, at 3.70 francs the piaster, which the agent of the parties interested charged himself with dividing among them. The payment was to be effected after approval by the tribunal by transmitting to M. Trufley of 5,208 lottery bonds, the value of each bond calculated at 85.25 francs (note these bonds were then quoted on the bourse at 72 francs).

This transaction was presented to the tribunal for approval, but the chamber of the council, by judgment of 25th of August, 1892, did not consider itself required to approve it except as concerned the affair of Gay, in which a minor was found to be interested, holding as to the rest, "that it belonged to the liquidator according to the terms of the powers which have been conferred upon him to enter into transactions (de transiger), if he finds it useful without authorization by the courts."

*Tanguy affair.*—According to a contract of May 28, 1884, the company

<sup>a</sup> See of Second Report.

had conceded to M. Amédée Ligée a lot of lands to be excavated, calculated by the contract at 200,000 cubic meters, at a place called "Les Buttes de Pena Blanca," between kilometers 21 k. 870 m. and 23. This contract was transferred after the death of M. Ligée to M. Tanguy by a substitution dated 24th October, 1884.

According to an agreement of the 3d of January, 1888, this contract was dissolved, but the parties not being able to agree as to their respective accounts, the Canal Company obliged itself by the said convention to turn over provisionally to the safe of M. Henry Ehrmann, banker at Panama, the sum of 120,000 piasters as guaranty for the indemnities which might be allowed to M. Tanguy by a definitive decision of the courts having jurisdiction. M. Tanguy carried his demand for indemnity before the Colombian judges, and after a long proceeding there was, on May 19, 1892, a judgment of the tribunal of commerce of Panama condemning the liquidator to pay M. Tanguy the sum of 124,268.33 (piasters).

The representative of the liquidator in advising him of that decision informed him, after having taken the advice of the counsel of the liquidation at Panama, that this judgment if taken before the appellate tribunals could only be confirmed, and that the amount would only be augmented by a condemnation in the costs, while on the other hand it was possible to settle by abandoning to M. Tanguy the 120,000 piasters on deposit with M. Ehrmann.

But the liquidator was served with oppositions at Paris of the sums due to M. Tanguy, oppositions not made regular by proceedings at Panama, and consequently without effect according to the jurisprudence of the Colombian tribunals. The liquidator, after having brought the facts to the knowledge of the opposing parties and having waited the time necessary to permit these to regularize their proceedings, caused to be submitted to the Colombian judges the question of the validity of these oppositions.

On July 12, 1892, the superior tribunal of Panama judging in last resort declared void and of no effect the attachments in Paris.

In consequence a transaction was concluded on July 3, 1892, by the terms of which this affair was terminated by the abandonment to M. Tanguy of the 120,000 piasters on deposit with M. Ehrmann. This transaction was approved by judgment of the superior tribunal of Panama dated July 25, 1892.

*Lux affair.*—By the terms of a contract dated October 1, 1888, M. A. Lux engaged himself to furnish to the company 40,000 ties for ordinary railroad tracks. The delivery of these 40,000 ties was to be effected as follows: Twenty thousand ties within three months from the signature of the contract, that is, as extreme limit by the 1st of January, 1889, the 20,000 others in the following two months, extreme limit March 1. If at that date the delivery was not completely made, M. Lux was to incur a penalty without any legal proceedings (*de plein droit*) of 500 piasters.

The delivery not having been accomplished within the prescribed time, M. Lux was directed by order from the company's officials dated March 8, 1889, to suspend the furnishing of ties until further orders. M. Lux, claiming that the delay in the delivery was caused by the company, and moreover, that he had a right to continue the delivery upon paying the penalty of 500 piasters, sued the company before the Colombian tribunal for the payment of 44,711.80 francs, value of the 31,937 ties remaining to be delivered, and 15,000 piasters by reason of the damages for non-reception of the ties, to wit: a total of 59,711.80 francs.

The tribunal of commerce of Panama sustained in part the claims of M. Lux and condemned the liquidation to pay to M. Lux the sum of 44,711.80 francs, representing the value of the 31,937 ties to be delivered, rejecting the demand for damages. This decision carried on appeal before the superior tribunal was set aside and the company was discharged from the condemnation pronounced against it. Finally, the court of cassation at Bogotá getting jurisdiction confirmed the sentence of the superior tribunal.

PROCEEDINGS INSTITUTED BY VARIOUS BONDHOLDERS.

1. *Joreau affair*.—Mlle Joreau, bondholder, obtained on January 26, 1893, from the civil tribunal of the Seine a judgment condemning the liquidator to pay her—

(1) The amount paid by her for her subscription to divers bonds of the company;

(2) Damages representing the amount of the sum promised as anticipated reimbursement (prime d'amortissement) due on those bonds;

(3) The unpaid coupons up to December 14, 1888;

(4) The legal expenses.

This judgment gave to the liquidator five weeks in which to pay, a time during which all proceedings were to be suspended.

This time having expired, the liquidator, in view of the vote of the Chamber of Deputies on the bill presented by the Government on March 6, took an appeal from that judgment.

In contempt of that appeal Mlle Joreau caused the seizure, on March 8, at the headquarters of the liquidation, of unissued lottery bonds.

The liquidator immediately introduced a proceeding to nullify that seizure, which is now pending before the tribunal. The court of appeal by decree of June 29, 1893, simply and without change confirmed the judgment of January 26.

Mlle Joreau has caused the service, in virtue of her judgment, of attachment orders upon divers persons.

2. *Roger affair*.—This affair is identical with the Joreau affair.

*François affair*.—The same as the Joreau affair.

*Donnadieu and Bougala affairs*.—The same.

*Debrys affair*.—The same.

*Affair of the heirs of Vaillant*.—The same.

*Denovarre affair.*—The same. The same proceedings, the same appeal, the same measures to secure execution (*mésure conservatoire*), only M. Denovarre has proceeded by opposition.

3. *Salleix-Laboige affair.*—An affair analogous to the Joreau affair. Judgment of the same day, January 28, 1893, not yet notified (*signifié*).

No measure to secure means of execution.

4. *Doumic affair.*—An affair analogous to those of Joreau and others.

5. *Divers bondholders.*—MM. Pichot, Noyelle, Delaplace, Laporte, Gesnys, Pilon; Vve. Lepêcheux, Dubar, Raffard, Bonhoure; Mlle. Taniès, Chappellier, Estagerie; Vve. Sarrazin, Sassier, Brion, Petit; M. Jamain.

Proceedings introduced by the above mentioned with the same object as the Joreau suit. The affairs are pending.

N. B.—M. Estagerie has considered himself authorized by his bonds themselves and without judicial permission to enter an opposition in the hands of M. Silvestre, notary at Tulle, as to the sums which may be due to the liquidation.

Same situation as to M. Sassier, Mme. Vve Brion, M. Jamain, and Mme. Petit. In these cases the oppositions have been served upon Messrs. Hugo Oberndoerffer, Eiffel, Baihaut, and others. All these individual suits and the measures taken in pursuance of them are to-day suspended in consequence of the promulgation of the law of July 1, 1893, which will be discussed hereinafter.

*Muraccioli affair.*—M. Muraccioli, contractor, sued the liquidator on the 21st of October, 1892, for payment of an account of 845 piasters 4 centavos, representing 3,380.15 francs, at 4 francs the piaster, fixed by the plaintiff.

The liquidator, while recognizing the principle of the demand, claimed to owe only 3,274.53 francs, the piaster being worth, according to him, 3.875 francs.

The tribunal, by judgment of April 11, 1893, condemned the liquidator to pay M. Muraccioli the sum of 3,380.15 francs.

The judgment was notified to the liquidator the 23d of May, 1893. It has not been executed.

This action is also suspended as a result of the promulgation of the law of July 1, 1893.

*Reinach affair.*—On December 3, 1892, the liquidator, in view of the actions and rights which he might have to make use of against the succession of Baron de Reinach, served notice upon his heirs and M. Imbert, provisional administrator of his succession, prohibiting them to proceed without his presence with the operations of accounting liquidation and division of the succession.

Moreover, on August 27, 1893, the liquidator sued M. Imbert, administrator of the succession of Reinach, for restitution of the sum of 9,253,792.59 francs, received by M. Reinach on account of (1) participation in the syndicates of the different issues of bonds of the Panama company; (2) payment of expenses of publication for the said issues; (3) payment of commission by the concerns Cubtill, De Lungo, Watson & Van Hattum, Artigue, Sonderegger & Co., and Eiffel.

*Cornelius Herz affair.*—M. Imbert, provisional administrator of the succession of Baron de Reinach, instituted before the civil tribunal of the Seine a suit against M. Cornelius Herz, to have it declared that seven pieces of real property situated at Paris, and appearing to belong to Mme. Cornelius Herz, were in reality the property of M. Cornelius Herz and should be replaced among his assets.

By means of conclusions notified the 19th of June, 1893, the liquidator intervened in the proceedings to join in the demands of M. Imbert.

Subsequently to this date M. Gautron, appointed coliquidator, introduced conclusions to revive the action.

M. Lemarquais, mandataire of the bondholders, also intervened in the proceeding.

On February 15, 1894, the civil tribunal of first instance of the Seine rendered a judgment (judgment sustaining the demands quoted).

The tribunal also found itself possessed, by the action of M. Lemarquais, mandataire of the bondholders, of a demand for restitution of the sum of 600,000 francs received by Cornelius Herz from the Panama company.

MM. Monchicourt and Gautron intervened in that proceeding. By a judgment, also rendered February 15, the tribunal admitted the interventions of MM. Monchicourt and Gautron in their official characters and suspended judgment to await the definitive result of criminal proceedings against Cornelius Herz, reserving a decision as to costs.

On the 10th of March, 1894, a transaction took place between M. Imbert, judicial administrator, and the succession of M. de Reinach, M. Lucien de Reinach, Mlle. Juliette de Reinach, M. Gautron, coliquidator of the Universal Company of the Interoceanic Canal of Panama; M. Lemarquais, mandataire of the bondholders of Panama, and Mme. Bianca Saroni, wife of Cornelius Herz, acting as well in her own name as the authorized agent of her husband.

This transaction will be submitted for approval to the tribunal conformably to the requirements of the law of July 1, 1893.

*Baihaut affair.*—Madame Baihaut, following up a proceeding instituted by her husband, introduced before the civil tribunal of the Seine an action for separation of property. The liquidator intervened in that action in the character of eventual creditor of M. Baihaut. The action was pending when, on March 31, 1893, there was rendered a decree of the assize court [the court ordered him and others to reimburse to the liquidation the sum of 375,000 francs received by M. Baihaut]. Upon considering these intervening matters, the civil tribunal passed upon the demands of Mme. Baihaut. By judgment of March 28, 1893, the tribunal pronounced the separation of properties, admitted the intervention of M. Monchicourt, declaring as to the rest that the operations of the liquidation could not take place except in his presence or after due notice to him.

The beginning of the operations of the liquidation, at the instance of Mme. Baihaut, took place on April 10, 1893, with the aid of M. Bertrand, notary. The liquidator caused himself to be represented there.

It is not known at present what sum the liquidator will be able to recover from the personal property of M. Baihaut.

*Cottu affair.*—On March 27, 1893, Mme. Cottu introduced an action for separation of goods against her husband, Henri Cottu. By conclusions notified the 16th of April, 1893, the liquidator intervened in that action. By judgment of May 15, 1893, the tribunal pronounced the separation of goods between husband and wife, admitted the intervention of the liquidator, and ordered that the operations of liquidation were to take place only in the presence of M. Monchicourt. The liquidation is proceeding.

*Hugo Oberndoerffer affair.*—On May 9, 1893, the liquidator sued M. Oberndoerffer for restitution of the sum of 3,931,354.45 francs received by him by reason of: (1) Participation in the syndicates for the issue of the bonds of March 14 and June 26, 1888; (2) commissions for placing bonds and aid in the issue of June 26, 1888; (3) payment of expenses of publication. The affair is pending.

*Wyse affair.*—In May, 1890, the liquidator confided to M. Lucien-Napoleon Bonaparte Wyse the mission of going to Bogotá to negotiate with the Colombian Government for a prorogation of the concession accorded on the 18th of May, 1878, for the construction of the canal of Panama.

On his return to France, after having obtained the prorogation on the conditions which the liquidator has explained in his second report M. Wyse claimed from the liquidator the payment of his fees. On account of this payment a disagreement arose between M. Bonaparte-Wyse and the liquidator, M. Bonaparte-Wyse placing his case before the first chamber of the civil tribunal of the Seine.

Finally, M. Bonaparte-Wyse claimed a million, of which the liquidator refused to pay the whole amount, alleging that M. Bonaparte-Wyse had not fulfilled his orders in the conditions provided, and that a portion of the amount could not be exacted. The liquidator offered 400,000 francs.

By a judgment of the 11th of January, 1894, the tribunal condemned the liquidation to pay M. Bonaparte-Wyse the sum of 400,000 francs in full settlement of all claims.

ACTION OF THE LIQUIDATORS AGAINST THE ADMINISTRATORS OF THE OLD  
UNIVERSAL COMPANY OF THE INTEROCEANIC CANAL.

During the month of August, 1893, MM. Monchicourt and Gautron, both acting in the name of and as liquidators of the Universal Company of the Interoceanic Canal of Panama, summoned the former administrators of the said company before the civil tribunal of first instance of the Seine for the payment of damages to be fixed by accounting for mismanagement, and demanded a provisional condemnation of 50,000,000 francs.

TRANSACTION WITH M. EIFFEL.

On the 11th of August, 1893, M. Lemarquis, mandataire of bondholders entered an action against M. Eiffel for 18,000,000 francs, and asked that the judgment might be also in favor of the liquidators of the Panama Company.

On the 26th of January, 1894, a transaction took place between MM. Monchicourt and Gautron, liquidators of the Panama Company, M. Lemarquis, mandataire of the bondholders, and M. Eiffel.

This transaction will be submitted to the approval of the tribunal in conformity with the law of July 1, 1893.

[Fourth report of the liquidator.]

In this connection I have the honor to remind the tribunal that, since the month of August, 1894, I have made a series of arrangements with the different contractors the terms of which, after having examined the accounts of each one, I have undertaken to pay in lottery bonds, warning each of them that the remittance of these bonds could not take place until after I had obtained, either by judicial authority or friendly arrangement the release of the attachments upon these lottery bonds.

BARATOUX, LETELLIER & CO.

Agreement of the 8th of August, judgment of 10th of August, payment in lottery bonds at their market value within fifteen days preceding the agreement, increased by 3 francs.

	Francs.
Debt settled at .....	2, 269, 009. 33
Lottery bonds to be delivered, 18,270, at 124 francs 18.75 centimes .....	2, 268, 905. 63
Cash balance .....	103. 70
Total .....	2, 269, 009. 33

JACOB SUCCESSION.

Agreement of the 8th of August, 1894, approved on the 9th of August, payment in lottery bonds at their market value within fifteen days preceding the agreement, increased by 3 francs, the value not being less than 120 francs.

	Francs.
Debt settled at .....	2, 126, 366. 01
Lottery bonds to be delivered, 17,122, at 124 francs 18.75 centimes .....	2, 126, 338. 37
Cash balance .....	27. 64
Total .....	2, 126, 366. 01



## ARTIGUE SONDEREGGER &amp; CO.

Agreement of August 14, 1894, confirmed August 17, payment in lottery bonds at their market value within fifteen days preceding the agreement, increased by 3 francs.

	Francs.
Debt settled at .....	1, 921, 004. 88
Lottery bonds to be delivered, 15,657, at 122 francs 68.75 centimes .....	1, 920, 918. 18
Cash balance .....	86. 70
<b>Total</b> .....	<b>1, 921, 004. 88</b>

I also settled the debt due M. Eiffel in execution of the transaction of the 26th of January, 1894, approved by the tribunal, the bonds to be accepted by M. Eiffel at the price of 125 francs.

	Francs.
Amount due to him .....	7, 147, 264. 33
Lottery bonds, 57,178, at 125 francs .....	7, 147, 250. 00
Cash balance .....	14. 33
<b>Total</b> .....	<b>7, 147, 264. 33</b>

The contractors gave me the bills which they held, and by an act received the same day by Me. Mégret, notary, they gave their discharge from the sequestration constituted on the 9th of February, 1889, and released the pledge (*nantissement*) which was conceded to them on the 30,500 shares of the Panama Railroad Company, and Me. Chéramy, the pledge-holder, handed me the titles to these shares.

In execution of the engagements which I made in the by-laws, I have transferred to the new company of the canal of Panama the rights of the liquidation in the railroad from Panama to Colon; I took the necessary steps to assure myself of the inalienability of these rights and of their eventual return to the liquidation in the circumstances provided for by article 5, paragraph 3, of the by-laws, etc.; in accord with the council of administration of the New Panama Company, the Comptoir National d'Escompte has been named as trustee to hold said rights.

It then remained for me to pay the second quarter of the 158,950 shares of the new company subscribed by the liquidation.

I was obliged, in this case, to pay an interest of 6 per cent on account of delay (article 12 of the by-laws) from the 31st of October, 1894, on a sum of 3,973,750 francs.

I employed for the payment of these shares all the available resources of the liquidation and the sums resulting from various payments and transactions.

M. Imbert, liquidator of the De Reinach succession, paid, in May, 1894, to M. Lemarquais, mandataire of the bondholders, the sum of 1,000,000 francs in virtue of the transaction with M. Cornelius Herz and the De Reinach succession.

The heirs of Barbé paid to M. Lemarquis, in December, 1894, the sum of 500,000 francs in execution of a transaction of August, 1894.

On the 7th May and 4th December, 1894, conformably with article 5, paragraph 2, of the law of July 1, 1893, M. Lemarquis paid these two sums, forming a total of 1,500,000 francs to the credit of the liquidation, into the "Caisse des dépôts et consignations."

I received, on the 31st of December, 1894, the amount of the judgment pronounced against M. Baihaut, namely, 534,791.60 francs.

Finally, after the 30th of June, 1895, M. Lemarquis paid to the credit of the liquidation, as realized from the transaction with M. Cornelius Herz, various sums amounting together to 1,335,868.33 francs.

Under these conditions I was enabled to pay to the new company, in settlement of the second quarter, on the 158,950 shares which have been ascribed to the liquidation, 3,973,750 francs.

I have thus been able to pay the first two quarters of all the shares of the new company subscribed by the liquidation, and have paid the interest for delay, without having recourse to the alienation of any lottery bonds.

[Fourth part.]

VARIOUS MATTERS.

To complete the recital of the litigation (situation contentieuse) of the liquidation I must mention the following facts:

1. From the time of the constitution of the civil company for the amortization of the lottery bonds the headquarters of that company were established at the property possessed by the Panama Company, at Rue Caumartin, Paris, and the latter company was charged with effecting, free of charge, the payment of the sums due to the civil company on the lottery bonds, and to assure, free of charge, the issuing of the bonds and the drawings.

After the liquidation of the Panama Company, and the sale of the property in the Rue Caumartin, the civil company was obliged to transfer its head offices to the branch of the Comptoir National d'Escompte of Paris, 2 Place de l'Opéra, and to charge that establishment to assure the issuing of bonds and drawings.

The council of mandataires of the civil company demanded of the liquidation the sum of 150,000 francs as guaranty of the expenses of the administration, as well for the past as for the future.

The judgment of the 3d August, 1894, which sanctioned the agreement made in regard to the settlement of the balance of the lottery bonds, fixed the sum to be paid by the liquidation at 130,000 francs.

This judgment has been executed.

The civil society for the amortization of the new bonds, third series, of the Old Panama Company (issue of March, 1888) was in the same situation as the civil society for the amortization of the lottery bonds. It was obliged to assure the issuing of bonds and the drawings, which could no longer be done free of charge by the liquidation.

It claimed from the liquidation:

	France.
Advance for acquiring a wheel, expenses of putting numbers on the wheel, etc .....	5,280
Expenses of administration up to 1894.....	1,000
To assure, in the future, the expenses of administration and of drawings.....	50,000
Total .....	56,280

The Tribunal by judgment of August 3, 1894, condemned the liquidation to pay:

	France.
For acquiring a wheel, etc.....	5,280
Expenses of administration and drawings, as well in the past as in the future .....	20,000
Total .....	25,280

This judgment has been executed.

---

[Fifth report of the liquidator.]

#### LITIGATION IN FRANCE.

*Affair Vignaud, Barbaud, Blanleuil & Co.*—This affair received a definitive solution by means of a transaction under date the 7th of March, 1896, entered into between the liquidator of the Panama Company, the judicial mandataire of the bondholders, M. Bonneau, in the capacity of liquidator of the company of current accounts and deposits, and MM. Vignaud, Barbaud, Blanleuil & Co.

MM. Vignaud, Barbaud, Blanleuil & Co. demanded of the liquidation the payment of a total sum of 16,402,154 francs, made up as follows:

	France.
1. Balance of the price of their work.....	1,336,154
2. Damages .....	15,066,000
Total .....	16,402,154

They demanded besides, the restitution of their security in government annuities (that is 37,748 francs of 3 per cent rente of the French Government) with the back receipts or interest on them and the reimbursement of the sum of 1,283,547.20 francs arising from the guaranty held by the Old Panama Company.

The liquidation, on its side, claimed to be a creditor of MM. Vignaud, Barbaud, Blanleuil & Co., by reason of the inexecution of their contracts, and claimed from them the sum of 8,658,703.65 francs. Finally, M. Bonneau, judicial liquidator of the company of current accounts and

deposits, intervened in the name of that company as the creditor of MM. Vignaud, Barbaud, Blanleuil & Co.

In this situation, the parties being desirous of putting an end to the suit in which they were engaged, concluded a transaction on the following basis:

M. Bonneau was authorized to withdraw from the Caisse dépôts et consignations the sums and values which had been deposited there and which represented the securities of MM. Vignaud, Barbaud, Blanleuil & Co., and the back interest arising on them.

M. Bonneau was authorized to realize on the 37,748 francs of 3 per cent annuity which constituted the bond given by MM. Vignaud, Barbaud, Blanleuil & Co. From this realization, increased by the amounts withdrawn in money, M. Bonneau takes a sum of 900,000 francs which was acquired to the company of current accounts and deposits.

This sum has been applied:

1. To reimburse to the company of deposits and current accounts the amount in principal of a credit given to MM. Vignaud, Barbaud, Blanleuil & Co. of 250,000 francs.

2. To give back to the same company the sum of 650,000 francs put up as security for Vignaud, Barbaud, Blanleuil & Co.

The liquidation of the Panama Company has kept the back interest received by them on the 3 per cent annuity (French Government rentes) of 37,748 francs, namely, 84,933 francs, and has received besides from M. Bonneau the sum 188,740 francs for the back interest of the said annuity paid in by the Bank of France and the Caisse of consignations, successively depositaries of the values.

This transaction was approved by the judge commissaire of the judicial liquidation of the company of current accounts and deposits and approved by the tribunal of commerce (judgment of 23d of March, 1896) and by the tribunal of the Seine (judgment of 22d of May, 1896).

*Lemarquis affair, mandataire of bondholders, against the liquidation.*—In the month of August, 1893, M. Lemarquis, judicial mandataire of bondholders, summoned the liquidation for payment of the sum of 1,777,111,600 francs, with interest, this sum representing the amount of all the bonds issued by the Universal Company of the interoceanic canal, even in the form of lottery bonds. This proceeding had for its object the determination by the tribunal of the basis of the distribution to be made by the liquidator. It raised, as well from the point of view the calculation of the debt of coupons and that of the sinking payments as from the point of view of the admissibility, as a debt of the liquidation, of the lottery bonds and others of which the amortization is guaranteed by civil companies, very delicate questions and a complicated accounting. M. Lemarquis and myself have united our efforts in order that the decision of the tribunal should not be delayed.

*Affair Derenne and associates against the liquidation.*—On the 26th December, 1896, MM. Derenne, Le Voyer, and others, holders of bonds in the

Old Panama Company, summoned me before the tribunal of the Seine, asking that it might be ordained that in the space of time that it might please the tribunal to fix—

“M. Gautron should proceed to the distribution among the creditors and bondholders of the assets such as they exist in the hands of the liquidator, reserving the amount necessary to make the final payment for the stock of the New Panama Company.

“To have determined by the tribunal, the conditions of the speediest possible realization of the assets, in view of the long time since the placing into liquidation of the company, and the necessity for finishing it before the original subscribers disappear.

“To have it decreed that the lottery bonds be distributed *pro rata* among the bondholders according to their ascertained rights, and if this could not be done by the distribution in kind that they should be sold, reserving to the bondholders of the company the right of preemption according to the precedents already established by the tribunal.

“To have M. Lemarquis bound with the liquidator by a common judgment.”

MM. Derenne and associates summoned the mandataire of the bondholders to have the judgment made a common one.

Various bondholders have intervened in this suit to oppose the claims of MM. Derenne and Le Voyer and others. It is not proper to discuss here a claim that has been submitted to the decision of the tribunal.

\* \* \* \* \*

(The sixth report of the liquidator quotes at length the decision of the tribunal denying all of the demands of MM. Derenne, Le Voyer, and others.)

*Iturralde affair.*—On the 22d of November, 1895, Mme. Maria Iturralde wrote from Panama to the liquidator to inform him that her father, Dr. Mateo Iturralde, deceased, was the owner, under the terms of a notarial act registered at Panama, of an island at Maria-Sala; that at the commencement of the canal works the agents of the old company occupied the ground and destroyed the plantations which were there; that her father had claimed the value of the ground and also an indemnity for the plantations destroyed; that the company had admitted the claim but objected that it would be necessary as a preliminary to proceed to measure the property in order to fix the value of the ground on the basis of a price paid in a similar affair of a M. Buitrayo; that she accepted these conditions.

The claim of Mme. Iturralde was terminated by a transaction under date the 27th of March, 1896, by the terms of which the liquidation paid to Mme. Iturralde a sum of 300 piasters in settlement of all claims.

*Affair of Messrs. Schuber Bros.*—MM. Schuber Bros., citizens of the United States of America, are proprietors of an estate called “Juan Diaz Caballero,” situated at Panama.

On the 9th of December, 1891, they sued the liquidation before the Colombian tribunal for payment of a sum of 150,000 piasters, reduced in

June, 1896, to 134,868 piasters, the old Panama Company having made use of a portion of their estate for the construction of a road from Panama to Corozal. There was included in the sum claimed, the value of the materials taken by the company from their estate, and damages for the injury caused to them by the destruction of the fences, the clearing away of the woods, the excavations, soundings, etc.

This affair gave rise to a complicated proceeding, and entailed numerous judicial decisions rendered by the civil tribunal of Panama, the superior tribunal of the same town, and the supreme court of Bogotá.

All attempts at an amicable arrangement up to the present have failed. The suit is continuing.

*Affair of Domingo Diaz.*—In 1885, at the time of the construction of the central hospital of Panama, the Universal Company of the Interoceanic Canal having acknowledged that a part of the property called "Huerta del Gallo," was necessary to them for the installation of dwellings for the doctors, chemists, and others, asked the proprietor, M. Ehrmann, to authorize their occupation of the said property.

M. Ehrmann accorded this authority gratuitously.

In 1888 M. Ehrmann sold the property "Huerta del Gallo" to M. Domingo Diaz, who claimed as belonging to him, the portion of the ground taken by the old company.

The action between M. Domingo Diaz and the liquidation is pending at Panama.

---

[Sixth report of the liquidator.]

#### LITIGATION IN FRANCE.

*Affairs of Derenne, Le Voyer, and associates against the liquidation.*—On the 26th of December, 1896, MM. Derenne, Le Voyer, and others summoned the liquidator before the civil tribunal of the Seine to have him ordered to immediately make among the creditors and bondholders the distribution of the assets remaining in his hands, and notably the lottery bonds, and to have determined the conditions of the realization of the assets.

By judgment of the 30th of December, 1897, the tribunal declared Derenne, Le Voyer, and their consorts inadmissible and unfounded in their demands and conclusions, dismissed them, and condemned them to pay all costs.

MM. Derenne and consorts took an appeal from this judgment by notification of Le Breton, bailiff, dated the 25th of March, 1898.

But they did not follow up this appeal, but withdrew from it by document of Le Breton, bailiff, dated March 30, 1898, upon payment of their costs by the liquidator.

*Affair of Lemarquis, mandataire of the bondholders, against the liquidator.*—The suit begun by M. Lemarquis, August 3, 1893, against MM. Monchicourt and Gautron had for its object to have determined by the

civil tribunal of the Seine the basis of the distribution which the liquidator would have to make among the different bondholders of the old Panama Company.

\* \* \* \* \*

M. Lemarquis took an appeal. The court of appeal passed upon the respective appeals of the liquidator and mandataire. \* \* \*

In conformity with this decree of the court of appeal and after the depositing by the expert of a modified report, the tribunal of the Seine, by a judgment dated August 1, 1900, has definitively fixed the basis of the distribution for the different kinds of bonds issued by the Universal Company of the Interoceanic Canal, the tribunal ratifying in all respects the report of Cagnat, expert, deposited in the clerk's office the 7th of July, 1900, and concerning the bonds of 1882, 5 per cent, and the bonds of 1884, 4 per cent,

Ratifying in all respects the report of Cagnat, expert, deposited in the clerk's office 19th of January, 1900, and concerning the new bond, third series, and the lottery bonds, but only as to the part of his report prepared on the basis established by the definitive judgment of March 2, 1899:

Declares that it is not necessary to consider or pass upon the remainder of the said report made contrary to the basis fixed by the said gentlemen:

Declares that at the time of the distribution of the assets in the manner prescribed by article 6 and following of the law of July 1, 1893, the holders of paid-up bonds of the hereinafter-mentioned issues who shall produce them at the place of liquidation within the time allowed by the law shall be admitted upon the following basis: Issue of 1882, 5 per cent, 450.62 francs per bond; issue of 1883, 3 per cent, 302.41 francs per bond; issue of 1884, 4 per cent, 343.54 francs per bond; issue of 1886, 6 per cent new bonds, first series, 557.10 francs per bond; issue of 1887, 6 per cent, new second series, 508.28 francs per bond; issue of March 14, 1888, new bonds, third series, 390.35 francs per bond; issue of June 26, 1888, lottery bonds, 295.65 francs per bond; and this with the interest on the said sums calculated from December 14, 1888;

The sums, principal and accessory, remaining due to pay completely what they are entitled to.

*Affair of Laplante against the liquidation—Tierce opposition to the judgment in the Derenne affair.*—By document dated June 27, 1898, M. Laplante acting in his capacity as heir of Mlle. Joreau, in her lifetime owner of a number of bonds of the Universal Company of the Interoceanic Canal, has introduced tierce opposition to the judgment rendered the 30th of December, 1897, in the suit by Messrs. Derenne and consorts, and has taken up, appropriating them to himself, the conclusions submitted by these latter.

By the same document he summoned before the civil tribunal of the Seine MM. Gautron, liquidator of the Universal Company of the Interoceanic Canal, and Lemarquis, mandataire by law of the bondholders.

By judgment of May 10, 1899, the civil tribunal of the Seine declared the tierce opposition of M. Laplante inadmissible on this ground, principally, that he was a party to the judgment of December 31, 1897, since he was represented therein by Lemarquis, who acted in that suit only in the character of mandataire of the holders of the bonds, and who, as such, united in his hands all the rights of individual action of these latter.

On June 30, 1899, M. Laplante appealed from that judgment. The court of appeals, by decree of April 25, 1900, confirmed in all respects the judgment of May 10, 1899.

*Affair of Donnadiou against MM. Gautron and Lemarquis.*—M. Donnadiou, the owner of a certain number of bonds of the old Panama Company, by document of the 5th of March, 1897, summoned M. Lemarquis, legal mandataire of the bondholders of the Panama Company, to institute suit against the stockholders of the Civil Panama Company for payment of the company's debts. M. Lemarquis not having begun any action of that kind, M. Donnadiou had the right, according to the terms of article 2, section 4, of the law of July 1, 1892, to exercise himself that right of action at his own risk and peril; but in order to do so, and to know who were the stockholders of the company, it was indispensable to him to have knowledge of certain documents, and especially of the list of transfers of the shares of the Panama Company. M. Lemarquis, if he had instituted such an action, would have had the right to require from the liquidator the communication of those documents.

M. Donnadiou, pretending to be subrogated to the legal mandataire, claimed to have the same right to that communication.

\* \* \* \* \*

By judgment of the first chamber of the civil tribunal of the Seine, Donnadiou was declared inadmissible and unfounded in his demands, dismissed, and condemned to pay the costs.

M. Donnadiou took an appeal from this judgment by document of April 1, 1898.

By decree of the first chamber, dated August 4, 1898, the court of appeals of Paris, adopting the reasons of the law court, decided against the appellant.

*Affair of Gautron against the council of mandataires of the civil company of redemption of the new bonds, third series (issue of March 14, 1888).*—(This was an attempt of this redemption company to dissolve, the liquidator interposing a protest. The company abandoning that plan then attempted to reduce its capital stock, which was also protested against, but the general meeting of the company undertook to carry out their plan. The civil tribunal of the Seine decided that the resolution of the general meeting was illegal, and forbade "the defendants to put into execution the said resolution, and especially to withdraw from the Bank of France all government bonds (rentes), in order to divide them among the bondholders of the company." The council of mandataires appealed,



and the affair was pending in the court of appeals when this sixth report of the liquidator was written. See Exhibit 9 for further proceedings.)

*Affair of Von Berg & Co. against the liquidator.*—By a notification of March 6, 1899, MM. Von Berg & Co. instituted before the civil tribunal of the Seine against the liquidation a demand of payment of 190,577.20 francs, representing—

1. The price of a steam excavator, a transporter, and the accessory implements;

2. The expenses of the voyage and stay in the Isthmus of MM. Von Berg & Co., or their representative, for the putting in place of this apparatus.

They demanded, besides, interest on the said sum to date from the summons made by them on the Universal Company of the Interoceanic Canal on May 5, 1888.

The liquidator opposed the demand, and maintained that according to the contract between MM. Von Berg & Co. and the Universal Company of the Interoceanic Canal the price of the apparatus was to be paid only after its delivery "in a good state of working and after receipt in the conditions determined."

These conditions had never been complied with. The affair is pending before the tribunal.

*Affair of Fourmont against the liquidator.*—M. Fourmont proceeded against the liquidator on the 15th of June, 1895, and against M. Eiffel in conjunction with him, for payment of a sum of 9,000,000 francs, which he claimed to be due him as damages on account of the copying of his patent, No. 162947, to his prejudice.

This summons remained without being followed up during four years.

On the 7th of July, 1899, M. Fourmont served M. Gautron with his corrected conclusions, asking the tribunal that—

Whereas by his initial proceeding M. Fourmont claimed from M. Gautron as liquidator and M. Eiffel a sum of 9,000,000 francs by way of damages;

And whereas it was by error that this condemnation was demanded against M. Eiffel, who was not a party in the matter;

And whereas, on the other hand, in order to ascertain the merits and the amount which M. Fourmont has a right to demand, it is proper to send the matter before a judge of the tribunal for him to fix the sum of the damages to which he is entitled;

For these reasons to declare M. Fourmont's demand to apply to M. Gautron as liquidator, and not to M. Eiffel, and, before deciding the matter, to send it before such one of the judges as the tribunal may see fit, to fix the amount of the damages.

The liquidator considers that the contention of M. Fourmont already made several times does not rest upon any serious foundation. The affair is pending before the civil tribunal of the Seine.

## LITIGATION IN COLOMBIA.

*The affair of Schubert Bros. against the liquidation.*—On December 9, 1891, the Schubert Brothers sued the liquidator before the Colombian tribunals for 150,000 piasters, which sum was reduced by them in June, 1896, to 134,868 piasters, in reparation of a damage which the Universal Company of the Interoceanic Canal had caused them by opening on their land the road of Corozal. (Fifth Report.)

By a decision of July 28, 1898, the judge of first instance condemned the liquidator to pay M.M. Schubert Brothers 45,935 piasters 95 centavos. The liquidator appealed from this decision, and the superior tribunal of Panama, judging in last resort, reduced to 28,339 piasters 67 centavos, the amount of the condemnation pronounced against the liquidator.

M.M. Schubert Brothers and the liquidator not having proceeded to the court of cassation, the superior tribunal, by a judgment of July 13, 1899, ordered the Panama Company in liquidation to pay to M. Henry Schubert, as representative of the company of Schubert Brothers, the sum of 28,339 piasters 67 centavos and the legal interest on that sum from June 30, 1899, to the day of payment, with the costs of the present proceedings.

On the request of M. Henry Schubert, dated September 25, 1899, and by judgment of September 27, 1899, the superior tribunal of Panama, in conformity with the said request, to the effect that there should be delivered to M. Schubert a letter rogatory to avoid the injury to him which would result from the delays incident to sending the matter through the diplomatic channel, decided in favor of this request, and that there should be an order delivered to the interested party. The notification of it was ordered.

In execution of this decision, on the 9th of October, 1899, the judge of the court delivered a letter rogatory addressed to the competent authority in civil matters of the city of Paris, which was requested to notify the judgment of July 13, 1899, to the representative of the Universal Company of the Interoceanic Canal, to require of him the payment of the sum required to execute the judgment, and in default of payment to require of him to furnish, under oath, property which could respond to the demand.

The judgment of July 17, 1889 (sic; should be 1899), that of September 27, 1899, and the letter rogatory of October 9, 1899, were served upon the liquidator by a document of Marecat, bailiff at Paris, on the 14th of March, 1900, at the request of M. Schubert.

The judgment of condemnation not having been notified through the diplomatic channel, and this procedure not being in conformity with French law, according to which judgments rendered in foreign tribunals can not receive execution in France, except after they have been declared executory by French tribunals, the liquidator reserves to himself, should M. Schubert carry out the formalities prescribed by French law and ask the exequatur of the judgment which he has obtained in

Colombia, to take the advice of counsel, as to the attitude which the exceptional position in which the law places him requires him to take.

*Affair of Domingo Diaz against the liquidator.*—At the time of the construction of a hospital at Panama in 1885, the Universal Company of the Interoceanic Canal obtained from M. Ehrmann the gratuitous permission to occupy a part of his property called "Huerta del Gallo," in order to place there a certain part of the hospital administration.

M. Domingo Diaz, to whom M. Ehrmann sold his property, claimed as belonging to him the land occupied by the company. (See Fifth Report.)

The claim of M. Domingo Diaz was rejected by a judgment of the tribunal of first instance of Panama, dated April 22, 1848 (sic).

M. Domingo Diaz took an appeal from that decision.

Contrary to all expectation, the superior tribunal of Panama, by a decision of June, 1899, condemned the liquidator to pay to M. Diaz the sum of 2 piasters per square meter of the land claimed by him according to a calculation by experts, with the legal interest since the day on which the plaintiff entered into possession of the land up to the day when he shall be paid its value.

The liquidator proceeded to the court of cassation. The affair is pending before the supreme court at Bogotá.

*Affair of Carreno against the liquidator.*—Some years ago the Universal Company of the Interoceanic Canal was condemned to indemnify Mme. Carreno for the damages caused to her by the company upon her property called "Honduras," requiring her to make proof of the damages in a new proceeding.

Dr. Jesurum, calling himself a transferee of the right of action of Mme. Carreno, started a new proceeding.

\* \* \* \* \*

As a result, the liquidator paid on July 30, 1900, to the agent of Dr. Jesurum the amount of 1,008.96 francs. The affair is terminated.

*Affair of Icaza against the liquidator.*—The heirs of M. Pablo Elias de Icaza claim that by virtue of a judgment dated December 16, 1886, their father had taken from him, for the benefit of the Universal Company of the Interoceanic Canal of Panama, 2 hectares, 42½ acres, being part of the property called "Carro de San Juan." They add that this taking of property was done with the fixing by judgment of an indemnity of 1 piaster 7 centavos per square meter of land; that is, 41,225 piasters for the 24,250 meters condemned.

They claim also that the judgment of December 16, 1886, was notified to the company on January 16, 1887, that it did take an appeal from that decision and has not paid the amount within the time fixed by the judgment.

As a result, they have obtained from the civil tribunal of the first district of Panama, dated September 6, 1897, a judgment ordering a seizure against the Panama Canal Company in favor of the heirs of Icaza to the amount of 41,225 piasters, and that on default of payment the company against whom the order for seizure is made shall name a depositary

and an expert valuer of the property to be seized, and in default of its making that nomination this shall be done by the tribunal or by some one designated by it for that purpose.

The tribunal at the same time ordered the notification in due form of its judgment.

The judgment was notified to the liquidator through the diplomatic channel on the 18th of June, 1898.

Since that time the parties have not taken any steps.

---

**EXHIBIT 11.**

**JUDGMENT OF JULY 26, 1894 (CIVIL TRIBUNAL OF THE SEINE), DECIDING AGAINST MILLE. JOREAU.**

**FRENCH REPUBLIC, IN THE NAME OF THE FRENCH PEOPLE.**

The civil tribunal of first instance of the department of the Seine, sitting in the palace of justice at Paris, has rendered in public session of the first chamber the following judgment:

Session of July 26, 1894.

Between M. Jean Poire Gautron \* \* \* and Mlle. Joreau, etc.  
\* \* \*

Considering that by virtue of a judgment rendered by this chamber January 26, 1893, condemning Monchicourt, in his character of liquidator of the Universal Company of the Inter-oceanic Canal of Panama to pay to Mlle. Joreau the principal sum of 153,169 francs 40 centimes, and, according to documents of Thiellement, bailiff at Paris, dated February 24 and 25, 1893, Mlle. Joreau has served injunction or garnishment papers upon the civil association for sinking Panama Canal lottery bonds and upon the director of the bureau of deposits and consignments, as to all the sums they have received or may receive, due to Monchicourt as liquidator by whatever right; that these papers have been served, but Mlle. Joreau has not proceeded in her suit to have them declared valid;

That Gautron, become liquidator of said company, demands that the opposition proceedings referred to may be declared without object in view of the law of July 1, 1893:

Considering that article 1 of that law has suspended from the date of its promulgation all pending suits begun against the liquidation by bondholders and all other creditors, and all proceedings for securing execution against the property, movable or immovable, of the company, even those in course of being executed;

Considering that this provision has for its object, as shown besides by what led up to it, to prevent certain creditors from creating rights of preference as against other creditors, and to make certain the progress of the liquidation by reserving to the liquidator alone the right to realize the assets for the benefit of all, in view either of a legal division among all creditors or of the contribution in the common interest, to a new

association, to be made under the supervision of the mandataire of the bondholders and the courts, and within the conditions specified by articles 10 and 11 of the law;

That the proceedings either of execution or preservation of means of execution, taken before that law, are then altogether without object;

That they can not produce any effect whatever in favor of those who have instituted them; that the defendant (Mlle. Joreau) admits that she has no right of preference as to the sums garnisheed, and that the liquidator has not the right to pay her;

That she does not demand to have the validity of her garnishment proceedings declared;

That she maintains, nevertheless, that the garnishment exists, and that, without opposing the distribution among all the creditors of the values garnisheed, she objects to the liquidator's disposing of them in any other manner;

Considering that this pretension is condemned by the formal and absolute prescription of the first article of the law of July 1, 1893;

That a proceeding suspended can not have any effect; that consequently, aside from the power which will belong to them at the time of the distribution, to produce as legitimate expenses, acts done under the reign of the old law, the creditors opposing here, like the creditors resorting to garnishment, have no other rights than that which article 11 recognizes for all creditors indiscriminately, namely, that of presenting to the tribunal, in the course of any proceeding for approval (homologation), the reasons which may appear to them good for opposing the adoption of such or such mode of realizing the assets, or the contribution to an association of these assets;

That it is proper, consequently, without its being necessary to pronounce release from the garnishee proceedings, to decide that they are altogether without object.

On the additional demand of Gautron for damages, considering, etc.

\* \* \* \* \*

For these reasons declares that the proceedings of the defendant, having been suspended by the law of July 1, 1893, the garnishment has become altogether without object and can not produce any effect; declares consequently that it constitutes no obstacle to the delivery of the sums garnisheed to the liquidator.

\* \* \* \* \*

---

#### EXHIBIT 12.

#### EVIDENCE AS TO PLEDGES OF PANAMA RAILROAD SHARES.

PARIS, August 29, 1902.

Certificate showing that all the dividends paid upon the shares of the Panama Railroad Company have gone into the treasury of the New Panama Canal Company, and that all votes in the meetings of the Panama

Railroad Company represented by said shares have been cast by the New Panama Canal Company, without any exception.

I certify by these presents that all the dividends declared and paid by the Panama Railroad Company since the month of October, 1894, upon all the shares transferred by the liquidator to the new company in virtue of the sale made by article 5, section 4, of the by-laws, have been paid to the New Panama Canal Company and have not remained in the possession of the liquidator.

The dividends paid by the Panama Railroad to the liquidator on the shares pledged in his hands have been paid immediately by the liquidator to this company, as results from letters of April 9, 1901, and June 16, 1902.

I certify likewise that during all the time since the month of October, 1894, all the votes to be cast at the general meetings of the said company for those shares have been cast exclusively by the new company, and that the liquidator has never been called to vote as owner of those shares.

MARIE,

*The Chief of General Accounts.*

For the liquidator, by procuration:

HENRY SOUD.

---

PARIS, June 16, 1902.

NEW PANAMA CANAL COMPANY, *Paris.*

MR. PRESIDENT: I have the honor to transmit to you herewith inclosed, after having made it payable to the order of your honorable company, a check for \$137,068, sent to me by the Panama Railroad Company for the dividend on the shares which you have deposited as a pledge, in virtue of our agreement of March 24, 1900.

Please acknowledge receipt.

Accept, Mr. President, the assurance of my distinguished consideration.

GAUTRON, *The Liquidator.*

Certified as correct.

The chief of general accounts:

MARIE.

---

PARIS, April 9, 1901.

NEW PANAMA CANAL COMPANY, *Paris.*

MR. DIRECTOR-GENERAL: I have the honor to transmit to you, after having made it payable to the order of your honorable company, a check for \$137,068, addressed to me by the Panama Railroad Company, as dividend of 2 per cent upon the shares which you have deposited with me as a pledge, in accordance with our agreement of March 24, 1900.

Please acknowledge receipt, and accept, Mr. Director-General, assurance of my distinguished consideration.

GAUTRON, *The Liquidator.*

Certified as correct.

The chief of general accounts:

MARIE.

AGREEMENT OF APRIL 27, 1895, BETWEEN THE LIQUIDATOR, THE NEW PANAMA CANAL COMPANY, AND THE COMPTOIR NATIONAL D'ESCOMPTE CONCERNING PANAMA RAILROAD SHARES.

Between the undersigned

1° M. Jean Pierre Gautron, judicial administrator of the civil tribunal of the Seine, residing at No. 13, Rue Tronchet, Paris,

Acting in the name of and as liquidator for the Compagnie Universelle du Canal Interocéanique de Panama, whose head office is situated No. 63 bis Rue de la Victoire, Paris,

Appointed to that office by judgment given by the chamber of the counsel of the tribunal of the Seine the 21st day of July, 1893,

On the one part

2° The New Panama Canal Company, an anonymous company, having its head office No. 7, Rue Louis-le-Grand, Paris,

Represented by Messrs. Chanove and Jonquière, administrators, who are specially empowered to sign this present contract by a resolution adopted by the council of administration of said company dated fifth March last, copy of which is hereto annexed.

Of the second part

3° And the Comptoir National d'Escompte, an anonymous company, whose head offices are situated No. 14, Rue Bergère, Paris,

Represented by M. Th. Berger, a member of the council of administration, and M. Alexis Rostand, manager, who is specially empowered to sign this present agreement by a resolution adopted by the council of administration of the said company, dated March thirteenth last, copy of which is hereto annexed,

Of the third part.

With a view to assuring the fulfillment of the conditions under which M. Gautron has transferred to the new company, in accordance with the terms of its by-laws, received by Messrs. Lefebvre and Champetier de Ribes, notaries of Paris, the 26th June, 1894, 68,534 shares in the Panama Railroad, and to provide against any inconvenience which might arise from a conflict between the French and American laws—

It has been agreed as follows:

ARTICLE 1.

M. Gautron and the new company constitute as amicable depository for the 68,534 shares of the Panama Railroad the Comptoir National

d'Escompte in Paris, in the name of which the said shares shall be enrolled, by virtue of the pure and simple transfers which shall be signed by M. Gautron with the briefest delay possible.

#### ARTICLE 2.

The Comptoir National d'Escompte shall collect the dividends and remit the amount to the new company after deduction of the commission which is allowable to it and all charges whatsoever incurred by said collections.

#### ARTICLE 3.

The Comptoir National d'Escompte shall issue its order, in the manner usual in America, for the exercise of the right of vote in the general meeting of the Panama Railroad Company, and for the constitution of all accredited agents in connection with said company, to persons designated by the New Panama Canal Co., said company being at any time able to modify said designation and having the sole right to give all attorneys or agents the instructions which said company may deem advisable.

#### ARTICLE 4.

The said shares shall remain deposited with the Comptoir National d'Escompte during the whole of the period of nontransferability stipulated by the by-laws of the new company.

In the event of the realization of the different contingencies provided for by said by-laws, the Comptoir National d'Escompte undertakes to sign all transfers of the 68,534 shares in question conformably with the collective requests which will be addressed to said Comptoir National d'Escompte by the liquidator and the new company, these requests and these only liberating the said Comptoir National d'Escompte.

In the event of any disagreement the Comptoir National d'Escompte shall conform to the decision of the civil tribunal of the Seine and of the court of appeal of Paris, to which courts is given to the extent necessary formal jurisdiction.

#### ARTICLE 5.

The Comptoir National d'Escompte accepts and undertakes to fulfill the mission conferred upon it by the above articles.

#### ARTICLE 6.

As compensation for its trouble and care the Comptoir National d'Escompte shall be paid annually the sum of two thousand francs.

All charges or disbursements whatsoever, especially judicial expenses resulting from the establishment of its mandate, as well as all prejudicial consequences which might arise from its quality of apparent proprietor shall be paid over on the first demand of said Comptoir National d'Escompte.



The whole shall be paid half by the liquidation and half by the new company, said parties being guarantee the one for the other with respect to the Comptoir National d'Escompte.

Made in triplicate at Paris, the twenty-seventh day of April, in the year one thousand eight hundred and ninety-five.

Approved, the writing,  
Signed: J. JONQUIÈRE.

Approved, the writing,  
Signed: GAUTRON.

A Director,  
Signed: BERGER.

Read and approved,  
Signed: G. CHANOVE.

Read and approved,  
COMPTOIR NATIONAL  
D'ESCOMPTE DE PARIS.

The Manager,  
Signed: ALEXIS ROSTAND.

AGREEMENT OF MARCH 24, 1900, BETWEEN THE LIQUIDATOR AND THE NEW PANAMA CANAL COMPANY CONCERNING PANAMA RAILROAD SHARES.

Between the undersigned:

M. Choron, in the name and as representative of the New Panama Canal Company, an anonymous company, whose principal office is at Paris, Rue Louis-le-Grand, No. 7;

M. Choron, specially authorized for the purposes of these presents, by action of the council of administration of the said New Panama Canal Company, copy of which has been hereto annexed,

Of the one part,

And M. Jean Pierre Gautron, judicial administrator of the civil tribunal of the Seine, acting in the name of and as liquidator of the Compagnie Universelle du Canal Interocéanique, whose office is at Paris, Rue de la Chaussée d'Antin, No. 42,

Of the other part,

Has been settled, agreed, and reviewed and stated beforehand, as follows:

The by-laws of the Compagnie Nouvelle du Canal de Panama were executed before Me. Lefebvre, at Paris, June 26th, 1894.

A party to the said by-laws was M. Gautron, in his character as liquidator, who made to the said Compagnie Nouvelle du Canal de Panama the transfer and contributions stated in article 5, paragraphs 1, 2, 3 and 4.

This transfer and these contributions were made under certain reservations and conditions, expressed in the same article 5, to-wit, especially;

"3d. The rights of every nature in the Panama Railroad, belonging to the liquidation and contributed by M. Gautron under section 4 of this article shall become the property of the present company from and after the stockholders' meeting provided for by article 75 hereof, without any pecuniary compensation, but upon the expressed condition that the

canal be constructed within the time fixed by the agreement of concession. Upon default in completion within such time, said rights shall revert to the liquidation.

"If, contrary to all expectation, the meeting in question should not take the necessary action for the completion of the canal, or if the course of action adopted by the meeting can not be carried out, the said rights in the railroad shall remain the property of the present company, but it shall pay to the liquidation the sum of 20 million francs by way of indemnity, and the share of profits set apart for the liquidation shall be half the profits of the present company, without other deductions than those provided in secs. 2 and 3 of article 51 hereof."

Now, article 75 provides that—

"When the amounts expended, as well for the work done upon the canal as for the discharge of the burdens resulting from the contribution of M. Gautron, shall reach about one-half of the cash capital of the company, at the minimum, a special technical commission thereto appointed at a proper time shall pronounce upon the results obtained from the work already done and upon the conclusions to be drawn therefrom as to the remainder of the enterprise.

"This commission shall be composed of two members appointed by the council of administration of the present company, and of two persons appointed by the liquidation of the old *Compagnie Universelle du Canal Interocéanique*. These four members shall appoint a fifth, who shall be president of the commission, and if they can not agree this president shall be appointed by the president of the tribunal of commerce of the department of the Seine.

"The council of administration shall be required to make public the opinion of this commission, and to call an extraordinary general meeting of stockholders in the manner provided in articles 61 and 62 hereof.

"This meeting shall consider the ways and means tending to insure the completion of the work and the stipulations contained in article 5, sec. 4, No. 3, hereof."

The parties explain, for clearness, that the time mentioned in paragraph 3 of article 5 of the by-laws, and which is fixed by the agreement of concession, means the time granted and to be granted by the agreement of concessions and by the various agreements of extension.

Two of the conditions set forth in the article above quoted have been fulfilled, to-wit: The expenditure of one-half the corporate capital, at the minimum, and the formation of the technical commission. This commission went to the Isthmus, there to proceed to the performance of its duties, and the results of the study to which it devoted itself are clearly favorable to the completion of the canal.

The *Compagnie Nouvelle du Canal de Panama* is, therefore, approaching the time when it must face the conditions under which, after publication of the report of the commission, it will have to call the extraordinary general meeting provided for by article 75 of the by-laws of incorporation.

But it is of opinion that, under the present circumstances, there would be the greatest advantage in postponing the calling of this meeting and deferring the final decisions provided for by article 75 above quoted.

M. Gautron, in his character as liquidator, moved by the idea which has always guided the liquidators of the *Compagnie Universelle du Canal Interocéanique* in their efforts to assure the completion of the enterprise, efforts constantly encouraged by the majority of the creditors, by the public authorities, and by the courts, considers that it is to the true interest of the liquidation to accept the views of the *Compagnie Nouvelle*.

In this state of the facts the parties have united upon the agreements hereinafter set forth:

ART. 1.

The assembling of the general meeting, called to take final action, in conformity with article 75 of the by-laws of the *Compagnie Nouvelle*, may be postponed for not more than three years from the date on which these presents shall become binding:

The *Compagnie Nouvelle* can not delay the calling of this meeting without, beforehand, coming to an agreement with the liquidator on this point.

ART. 2.

In case either of the two situations mentioned in the second paragraph, § 3 of article 5 of the by-laws should arise, the credit of 20 millions which would exist for the benefit of the liquidation shall be paid, principal and interest, by means of the income of all the rights and part interests belonging at that time to the *Compagnie Nouvelle* in the railroad from Panama to Colon, operated by an American company, called the *Panama Railroad Company*, whose principal office is at New York, and at latest in a period of 15 years from the date when the credit arises.

The credit of 20 millions in question shall bear three per cent interest from said date.

ART. 3.

To insure the payment of the credit to the liquidation, principal and interest, the *Compagnie Nouvelle de Panama* undertakes to give as a pledge (*nantissement*) for the benefit of the liquidator, the rights and part interests belonging to it in the railroad from Panama to Colon as they are set forth in article 5 of the by-laws, and to apply to the payment of this credit the entire revenue arising from the rights and part interests in question, after deducting only the expenses necessary for the running of the debtor company, which deductions shall be fixed at the beginning of each fiscal period, by agreement between it and the liquidator, after verification of the accounts of the preceding fiscal period.

These presents shall not become binding until after the regular pledging, to the satisfaction of the liquidator, of this security which shall be applied to the benefit of the liquidation, until full payment of the credit of 20 millions, principal and interest.

ART. 4.

Until full payment of the credit to the liquidator, principal and interest, all revenues arising from the Panama Railroad shall be applied, with the consent of M. Gautron, to the extinguishment of said credit.

As soon as M. Gautron's credit shall have been extinguished, an extraordinary general meeting of the Compagnie Nouvelle shall be called to reduce the capital of this company to a figure equal to the amount of actual assets at that time, so as to enable said company immediately to dispose of and distribute its net income, as well for the benefit of the liquidator as for that of the shareholders.

In conformity with the second paragraph of section 3 of article 5 of the by-laws of the Compagnie Nouvelle, taken in connection with article 51, the sinking fund, for the benefit of the shareholders, for the capital stock of the Compagnie Nouvelle du Canal de Panama, will not form part of the charges to be deducted from the annual income of the enterprise.

ART. 5.

No alteration in previous agreements is made, other than such as result from the present contract, which annuls and supersedes the agreement made under date of August 9th, 1899, and approved by the council of administration at its meeting of August 30th, 1899.

ART. 6.

The present agreement shall not become binding until after being submitted to the approval of a general meeting, called under the provisions of articles 60, 61, and 62 of the by-laws, and, thereafter, to the approval of the civil tribunal of the Seine.

ART. 7.

The expenses of recording, approval, and, in general, all expenses and fees which the present contract may occasion, shall be borne by the Compagnie Nouvelle du Canal de Panama.

Done in duplicate at Paris, March twenty-fourth, one thousand nine hundred.

The writing approved.

*Signed:* L. CHORON.

The writing approved.

*Signed:* GAUTRON.

---

RATIFICATION OF THE AGREEMENT OF MARCH 24, 1900, BY  
STOCKHOLDERS' MEETING OF NEW COMPANY.

NEW PANAMA CANAL COMPANY.

Taken from the report of the extraordinary general meeting of stockholders of the New Panama Canal Company, held July 7, 1900, at Paris, in the building of the Philosophical Association (*Société Savantes*), 8 Rue Danton.

## RESOLUTION.

The general meeting, after having heard the report of the council of administration, approves the contract made between the new company and the liquidation of the Universal Company of the Interoceanic Canal of Panama, dated March 24, 1900, and authorizes the postponement of the extraordinary general meeting provided for by article 75 of the by-laws to a time not later than three years from the date when the said contract shall become definitive; it authorizes also the council of administration to incur the expenses necessary for the continuation of the enterprise until such meeting shall take place.

Certified to be in conformity with the original.

M. Bô,

*President of the Council of Administration.*

---

DECREE APPROVING THE AGREEMENT OF MARCH 24, 1900.

[Official Journal of the French Republic, Tuesday, August 7, 1900.]

Publication made by M. Gautron, liquidator of the Universal Company of the Interoceanic Canal of Panama, in conformity with articles 10 and 11 of the law concerning the liquidation of the said company of July 1, 1893.

Public session of the first chamber of the civil tribunal of first instance of the department of the Seine on Wednesday, August 1, 1900.

The tribunal: Upon the request presented by Gautron, acting in his character of liquidator of the Universal Company of the Interoceanic Canal of Panama.

The said request signed "De Bievillé," his solicitor, and reading thus: "To the president and judges composing the first chamber of the civil tribunal of the Seine, etc.,"

And the documents having been produced;

Having seen the order of the president dated July 30, 1900, put at the end of the said request and reading: "That this be communicated to the attorney of the Republic in his office and we commit to M. Laporte, vice-president, to make his report, Paris, July 3, 1900. Signed, Baudouin;"

Having seen the written conclusions of the attorney of the Republic also put at the end of the said request, the said conclusions reading thus: "The attorney of the Republic does not oppose, Paris, August 1, 1900. Signed, Servin;"

Having seen articles 10 and 11 of the law of July 1, 1893;

After having heard at the session M. Laporte, vice-president, in his report, and M. Servin, substitute of the attorney of the Republic, in his conclusions;

After having deliberated according to law;

Considering that the agreement in question, which the extraordinary general meeting of stockholders of the new company of the Panama

Canal has, moreover, approved by resolution of July 7, of the current year, appears to be in conformity with the interests of the liquidation, and advantageous for the company:

That, consequently, it is proper to give it approval,

For these reasons,

Approves, purely and simply, the agreement entered into between the liquidator of the Universal Company of the Interoceanic Canal of Panama and the new company, dated March 24, 1900, in order that this agreement may be executed according to its form and tenor.

Done and adjudged by MM. Baudouin, president; Laporte, vice-president; Le Berquier, judge. In the presence of MM. Chauvin, substitute judge; Servin, substitute, assisted by Lasnier, clerk.

Copy conforming to the original.

(Signed)

A. DE BIEVILLE.

## EXHIBIT 13.

## LIST AND SPECIMENS OF BONDS.

## List of different bond issues of the Universal Company of the Interoceanic Canal.

Dates of issues.	Kind of bonds.	Number of bonds offered.	Number of bonds subscribed.	Cost of issue.	Interest.	Remarks.
A—Sept. 7, 1882	5 percent.	250,000	250,000	France.	25	<p>[To the issue of Sept. 25, 1884, there were subscribed 218,245 bonds only. The remainder, viz. 69,142 bonds, were negotiated on the stock exchange. Later, in 1886, 72,375 bonds of the second series of the same kind, created by a decision of Apr. 9, 1886, were also placed at the stock exchange.</p>
B—Oct. 3, 1883	3 percent.	600,000	600,000	437.50	15	
C—Sept. 25, 1884	{ 4 percent.	387,887	387,887	a 833.00	20	
	{ .....do	72,375	72,375	Divers.	20	
D—Aug. 3, 1886	New	500,000	458,802	450.00	30	<p>The number of bonds subscribed or placed was 112,483. Making use of the right given by the conditions of subscription to the lottery bonds, some subscribers exchanged 22,681 bonds, third series, for lottery bonds, which brought 89,802, the number of bonds of the third series.</p>
E—July 26, 1887	New, second series.	500,000	258,887	440.00	30	
F—Mar. 14, 1888	New, third series.	350,000	89,802	460.00	30	
G—June 26, 1888	Bonds, lottery	2,000,000	849,205	360.00	15	
	Lottery bonds	b 357,894	478,922	Divers.	15	<p>These lottery bonds were issued in virtue of the law of July 15, 1889; they make part of the two millions of bonds created in June, 1888, but without interest. Besides the issue of July 27, 1889, the liquidators have transferred some lottery bonds in payment to some creditors, and especially to the contractors. It is this that explains the difference between the number of bonds placed and the number of bonds offered for subscription.</p>

a And divers.

b To be taken in payment of lottery bonds.

Certified to be exact.  
Liquidator of the Universal Company by procuration:  
(Signed)

PARIS, August 25, 1902.

HENRY BOUDET.

*Specimens of bonds issued.*

Printed specimens of each and all of the issues of bonds were brought from Paris, and are described as follows:

No. 1, bonds, 5 per cent, issue of September 7, 1882.

No. 2, bonds, 3 per cent, issue of October 3, 1883.

No. 3, bonds, 4 per cent, issue of September 25, 1884.

No. 4, bonds, new, issue of August 3, 1886.

No. 5, bonds, new, second series, issue of July 26, 1887.

No. 6, bonds, new, third series, issue of March 14, 1888.

No. 7, bonds, lottery, issue of June 26, 1888.

No. 8, lottery bonds, issue of July 27, 1889.

Upon the bonds of issue No. 1 the language used is:

Universal Company of the Interoceanic Canal of Panama. Anonymous Company. Company capital, 300,000,000 of francs. Issue of 250,000 bonds, authorized by the general meeting of 29 June, 1882. Bonds of 500 francs, 5 per cent, to the bearer. Redeemable at par in 75 years. No. —. Paris, 15 January, 1883. By authorization: An administrator: The president-director: Ferd. de Lesseps.

On the coupons of the same we find:

Universal Company of the Interoceanic Canal of Panama. Bond No. —. Coupon of 12 francs 50 centimes, falling due the 15 July, 1899, etc.

On the back of the bond is a table of sinking-fund payments, with dates of payment and the numbers of bonds to be redeemed.

On bond issue No. 2 the wording is practically the same, the issue being of 600,000 bonds at 3 per cent. There is a similar table as to sinking fund on the back.

The language of the third issue is practically the same, the issue being of 337,387 bonds at 4 per cent. A sinking-fund table is also found on the back.

The language of the fourth issue is practically the same, except that it states that an issue of 458,802 bonds was authorized by the general meeting of July 29, 1885, and that the bond is a new one and is redeemable at 1,000 francs.

The fifth series contains language similar to the fourth, except that on the back, instead of the sinking fund table, we find the following:

"Extract taken from the prospectus of issue: The new bonds of the second series are redeemable at 1,000 francs in 48 years, by drawings every two months (six drawings per year), the 15 September, 15 November, 15 January, 15 March, 15 May, and 15 July.

"But the first drawing will take place on the 30 September, 1887, instead of the 15.

"After the first year 6,000 bonds will be redeemed; that is, 1,000 bonds at each drawing; the number of bonds redeemed will increase progressively every year until the end of the operation."

The language of the sixth issue has the following: "Universal Company of the Interoceanic Canal of Panama. Anonymous company, with capital at 300,000,000 of francs, and Civil Company for Sinking the



Bonds of the Panama Canal. Issue of March, 1888, with responsibility limited to what is put into the company. Issue of 350,000 bonds, authorized by the general meeting of 29 July, 1885. New bond to bearer, payable at 1,000 francs. The reimbursement of 1,000 francs is guaranteed by certificates of French Government annuities (*rente française*), bought by the Civil Company of Sinking, formed of all of the subscribers of the present loan; according to the terms of the document drawn up before Me. Champetier de Ribes and his colleague, notaries at Paris, 3 March, 1888."

On the back of the bond appears the following:

"Taken from the by-laws of the Civil Company of Sinking, according to the document received by Me. Champetier de Ribes and his colleague, notaries at Paris.

"Article first. There is formed, by these presents, between the appearers, a civil company.

"There shall be on the same footing as the appearers, as members of this Civil Company, all the future subscribers to the issue of March, 1888, of the bonds of the company of the Interoceanic Canal of Panama.

"Subscription to every bond of that issue will carry the adhesion of the subscriber to the present by-laws and his admission as a member of the company, as stipulated in the prospectus of the issue.

"Art. 2. The company has for its object:

"To syndicate the subscribers of the new issue of the company of the Panama Canal; to take charge of the sinking of the said loan by means of the retention which the subscriber will make upon each bond by him subscribed of a sum of 70 francs 28 centimes, which he will pay to the Civil Company;

"And by means of the capitalization of interest, to itself perform the operation of reconstituting the capital and the business of redemption of the bonds issued by means of a drawing by lot.

"Consequently:

"Upon the capital of issue of each new bond the company will receive the sum of 389 francs 72 centimes, and the Civil Company 70 francs 28 centimes, destined to sink the loan.

"Art. 3. The company will have for its name:

"Civil Company for Sinking the Bonds of the Panama Canal, issue of March, 1888, with responsibility limited to what is put into the company.

\* \* \* \* \*

"Art. 6. The contribution of each associate is limited to his putting in of 70 francs 28 centimes per bond, which will be furnished at dates above fixed; beyond that every call for funds is prohibited.

"In any event, a member can not be responsible to third persons beyond what he thus puts in.

"The company funds are made up of the combination of the sums received by the company upon each of the 350,000 bonds offered for subscription. If all the 350,000 bonds are not subscribed, the company funds will be reduced accordingly."

The seventh series, that of the lottery bonds, (and the eighth series is substantially identical, with the exception that it has stamped upon it the words "Certificate issued in virtue of the law of 15 July, 1889; not productive of interest," with the title of the liquidator of the old company, and the signature of Brunet by procuration) contains the following:

Universal Company of the Interoceanic Canal of Panama. Anonymous company with a capital of 300,000,000 of francs, divided into 600,000 shares of 500 francs; and civil company with responsibility limited to the company capital for the sinking of the lottery bonds of the Panama Canal, issue of 26 June, 1888. Loan of 720,000,000. Loan authorized conformably with the provisions of the law of 21 May, 1836, by the law of 8 June, 1888, but without any guarantee or responsibility of the State. Public subscription to 2,000,000 lottery bonds, carrying 15 francs per year, payable semi-annually the 1st of December and the 1st of June of each year, and redeemable by lot, or at 400 francs, within the maximum time of 99 years. The redemption of 400 francs and the payment of the lots will be guaranteed by a deposit of *rentes française* [Government annuities], or of other obligations [*titres*] guaranteed by the French Government. Provisional certificate to the bearer negotiable. No. —. Of an obligation of a paid-up bond of 60 francs.

The Universal Company of the Interoceanic Canal has received....	50
The Civil Sinking Company.....	10
The amount of capital, to wit, 300 francs, are to be paid on the dates and in the proportions shown opposite in such a manner that on each of the bonds entirely free [paid up], the part of the Universal Company of the Interoceanic Canal will be.....	300
And that of the Civil Sinking Company.....	60

This last sum, being destined to assure the payment of the lots and to constitute the sinking capital at 400 francs of all bonds regularly freed in conformity with the terms of the prospectus of the issue and of the by-laws of the Civil Company.  
Paris, the 26 June, 1888.

On the margin we read, with reference to the numbers 2, 3, 4, 5, 6, 7 (alluding to payments of 60 or 45 francs), the following:

*Payment of 60 francs from 20 to 25 August, 1888.*

	Francs.
Amount with stamp .....	60. 10
To be deducted interest at 4 % on 20 August, deducting charges ..	. 26
Net payment.....	59. 84
Of which 10. 00 for the civil company,	
And 49. 84 for the company.	
Total	59. 84.

Received by ————.

The ————.

Representing the company of the Interoceanic Canal and the Civil Company of Sinking.

On the back of the bond we find:

[Extract from the by-laws of the civil association for sinking the lottery bonds, issue of June 26 1888, according to document made before Maître Champetier de Ribes and his colleague, notaries at Paris.]

ARTICLE 1. There is formed by these presents a civil company among the appearers and all the subscribers and future possessors of lottery bonds, to be created by the Universal Company of the Interoceanic Canal of Panama.

ART. 2. The association has for its object:

To syndicate all the subscribers and future possessors of the lottery bonds of the approaching issue of the Universal Company of the Interoceanic Canal of Panama.

To secure the payment of the prizes hereinafter stated, and the sinking of the loan in ninety-nine years at the outside by means of the retention by the subscriber upon each bond subscribed by him of a sum of 60 francs, which he will pay over to the civil association.

And by means of a capitalizing of interest to perform itself the business concerning the prizes and the work of reimbursing the capital upon the following bases:

Six drawings per year from the 16th of August, 1888, to the 15th of June, 1913 (first drawing the 16th of August, 1888). Three prizes of 500,000 francs, 3 prizes of 250,000 francs, 6 prizes of 100,000 francs, etc.

August 16:	Francs.
1 prize .....	500, 000
1 prize .....	100, 000
2 prizes of 10,000 francs .....	20, 000
2 prizes of 5,000 francs .....	10, 000
5 prizes of 2,000 francs .....	10, 000
50 prizes of 1,000 francs .....	50, 000
October 15:	
1 prize .....	250, 000
1 prize .....	100, 000
2 prizes of 10,000 francs .....	20, 000
2 prizes of 5,000 francs .....	10, 000
5 prizes of 2,000 francs .....	10, 000
50 prizes of 1,000 francs .....	50, 000
December 15:	
1 prize .....	500, 000
1 prize .....	100, 000
2 prizes of 10,000 francs .....	20, 000
2 prizes of 5,000 francs .....	10, 000
5 prizes of 2,000 francs .....	10, 000
50 prizes of 1,000 francs .....	50, 000
February 15:	
1 prize .....	250, 000
1 prize .....	100, 000
2 prizes of 10,000 francs .....	20, 000

February 15—Continued.	Francs.
2 prizes of 5,000 francs .....	10,000
5 prizes of 2,000 francs .....	10,000
50 prizes of 1,000 francs .....	50,000

April 15:

1 prize .....	500,000
1 prize .....	100,000
2 prizes of 10,000 francs .....	20,000
2 prizes of 5,000 francs .....	10,000
5 prizes of 2,000 francs .....	10,000
50 prizes of 1,000 francs .....	50,000

June 15:

1 prize .....	250,000
1 prize .....	100,000
2 prizes of 10,000 francs .....	20,000
2 prizes of 5,000 francs .....	10,000
5 prizes of 2,000 francs .....	10,000
50 prizes of 1,000 francs .....	50,000

Per year, 366 prizes, amounting to 3,390,000 francs.

During the first twenty-five years the drawing of bonds repayable with prizes will constitute the sole sinking.

Four drawings per year from August 16, 1913, up to the complete sinking of the bonds.

Two prizes of 500,000 francs, two prizes of 250,000 francs, 4 prizes of 100,000 francs, etc.

August 16:	Francs.
1 prize .....	500,000
1 prize .....	100,000
1 prize .....	10,000
1 prize .....	5,000
5 prizes of 2,000 francs .....	10,000
50 prizes of 1,000 francs .....	50,000

November 15:

1 prize .....	250,000
1 prize .....	100,000
1 prize .....	10,000
1 prize .....	5,000
5 prizes of 2,000 francs .....	10,000
50 prizes of 1,000 francs .....	50,000

February 15:

1 prize .....	500,000
1 prize .....	100,000
1 prize .....	10,000
1 prize .....	5,000
5 prizes of 2,000 francs .....	10,000
50 prizes of 1,000 francs .....	50,000

May 15:	Francs
1 prize .....	250,000
1 prize .....	100,000
1 prize .....	10,000
1 prize .....	5,000
5 prizes of 2,000 francs.....	10,000
50 prizes of 1,000 francs.....	50,000

In this second period, independently of the sinking which will take place each year by the payment of prizes, the sinking at 500 francs will commence in 1913, according to a table which will be drawn up by the council of mandataires of the civil association and the Panama Canal Company.

The reimbursement at 400 francs of the bond drawings and prize is included in the payment of the prize and not added thereto.

ART. 5. The association takes the name of "The Civil Association, with responsibility limited to the capital invested, for sinking the lottery bonds of the Panama Canal, issue of June 26, 1888." \* \* \*

ART. 8. The contribution of each member is limited to the putting in of 60 francs per bond, which will be furnished at the dates above determined. Beyond that contribution all appeals for money are forbidden.

In no case can the member be responsible with regard to third persons beyond that contribution.

The company's funds are composed of the union of the sums received by the civil association. \* \* \*

ART. 12. The rights and obligations belonging to the bonds follow them into the hands in which they may be found.

Subscription or possession of a bond carries ipso facto adhesion to the by-laws of the association and to the resolutions of the general meeting of the associates. \* \* \*

#### GENERAL CONDITIONS.

Subscribers who fully pay up their bonds by making the payment required in the time fixed therefor—that is to say, from the 5th to the 10th of July, 1888, will have the right to a coupon of 7 francs 50 centimes, to fall due the 1st of December, 1888.

The subscribers will have at all times after the payment aforesaid the right to anticipate the total of payments with conversion of interests at 4 per cent per year. In this case the payment will be stated upon the provisional bond which they will preserve up to the 15th of December, 1889.

From the 16th of December, 1889, the provisional bonds will be exchanged for definitive ones, without conformity of numbers. The definitive bonds will alone take part in the drawing of the 15th of February, 1890.

The payment of the prizes will take place a month after each drawing, with deduction of all amounts remaining due.

The successive payments on the provisional bonds will be received at the headquarters of the company and at those of its correspondents in France and abroad.

The payments in arrears will be charged with an interest of 5 per cent a year.

The provisional bonds on which the required payments shall not have been effected may be sold at the Bourse of Paris, without notice to the delinquent, a month after the becoming due of the payment, for the account and at the expense and risk of the delinquent; in all cases they can not be made regular again except by payment of an amount representing the compound interests necessary to reimburse the capital of sinking and that of the guaranty of the prizes. In case of their drawing prizes, the holders of bonds not so made regular are deprived of the right to the amount due for sinking them and to the benefit of the prizes.

The definitive bonds shall have semi-annual coupons of 7 francs 50 centimes falling due the 1st of June and the 1st of December, payable at the headquarters of the company at Paris and at those of its correspondents in France and abroad.

---

EXHIBIT 14.

CERTIFICATE OF AUGUST 21, 1902, BY THE REGISTER OF DOCUMENTS AT PANAMA, STATING NO MORTGAGES AGAINST THE NEW PANAMA CANAL COMPANY.

REPUBLIC OF COLOMBIA.

The undersigned, register of public and private documents of the district of Panama, on the verbal request of Dr. Inocencio Galindo, and after having examined the books of registration No. 3, containing the records of mortgages for the period from 1887 until this day, certifies:

That there is no record of a mortgage affecting the properties of the New Panama Canal Company.

Panama, August 21, 1902.

(Signed)

CARLOS BARONA.

Charges received (decree 1209 of 1901): Examination of books, \$0.85; authentication, \$2.40; total, \$3.25.

(Signed)

CARLOS BARONA.

---

EXHIBIT A.

EXTRACT FROM TREATISE ON COMMERCIAL LAW.

By LYON-CAEN and RENAULT.

Third edition, volume 2, sections 666-667, A. D. 1900.

"The associations in which the associates were bound only to the extent of their contributions and could transfer their shares at will did not appear in France under the name of anonymous associations; that name was reserved for associations which the associations '*en participation*' of the present time represent. The associations now in question were not regulated either by the ordinance of 1673 or by any general law. The King alone, by individual edicts, authorized the creation of

associations in which the associates were bound only to the extent of the total of their contributions and in which the shares of the associates were transferable; these were generally called companies. Each edict contained the particular rules applicable to the association; very commonly the royal authority had a right of intervention in the affairs of the association; frequently, besides, the edict was not limited to authorizing the creation of an association. It conferred a monopoly. This practice was in conformity with the ideas of the old régime, in which a right was often recognized under the form of a privilege. Thus inventors, writers, were only protected on condition of having obtained a royal privilege. But there were in France, even before the Revolution, some associations having shares of stock (*par actions*) created without the intervention of the royal power. Thus, in 1750 there was created the association *par actions* called the Chamber of Insurance of Paris, which added to its name the following: 'Established as a private company (*en corps de compagnie particulière*) by a document of association.' \* \* \*

After the proclamation of the liberty of industry by the law of March 2, 1791, numerous companies were formed in France. \* \* \*

The convention considered these associations as instruments of speculation, injurious to the public credit. A decree of 26-29 Germinal, year 2, suppressed the existing companies and forbade the formation of any in the future, under any pretext or any name. The previous decree of 24th August, 1793, had already suppressed all associations the capital of which vested upon shares of stock issued to bearer (*actions au porteur*) on negotiable property or on subscriptions capable of being transferred. But it permitted the formation in the future of associations of this kind with legislative authorization. Following notions more correct, the directory abrogated, two years later, the decree of Germinal, year 2, by the law of 30 Brumaire, year 4. This law, in permitting the constitution of associations with shares of stock, did not establish any rule as to their formation or their proceedings. As a result, the courts rendered some extraordinary decisions, notably holding that the stockholders were bound personally and *in solido*. \* \* \*

The proposed code (of commerce) recognized, by the side of the association under a collective name and the association *en commandite*, the association with shares of stock, and with the view of preventing as much as possible the frauds to which that kind of association can lend itself, the project of the code required, for the formation of associations with shares of stock, the previous authorization of the Government (i. e., of the executive administration). \* \* \*

The courts and chamber of commerce demanded that the lawmakers should distinguish two classes of associations with shares of stock, one class to be authorized by the Government, the other to be free; and this distinction the code of commerce adopted. It recognized associations with shares in which there are only stockholders (*sociétés anonymes*), and associations in which there are both associates, who are personally responsible, and stockholders (*commandites par actions*). The former were subjected to the authorization of the Government; the latter could be formed in freedom (art. 37 et 38, Code

Commercial). The code of 1807 did not contain any special restrictive rule either as to their constitution or their proceedings."

Section 669 says:

"The authorization necessary for anonymous associations was given in the manner prescribed by regulations of the public administration—that is to say, a decree rendered upon the advice of the council of state (art. 37, Code Commercial). The latter received the project of the by-laws of the future company, and could advise that they should be approved and the association authorized, or not to authorize it until after modification of the by-laws, or to refuse the authorization altogether.

"The Government (the executive administration) was not required to give any reason for its decision. \* \* \* The code not containing more than some very summary rules concerning the legal character of anonymous associations, concerning the form (art. 40) of authenticating the document constituting the association, and concerning the publicity to be given to the document (art. 45), the Government (executive administration) had full liberty to require or not the insertion in the by-laws of clauses which seemed good to it, taking into account the amount of the capital, the nature of the operation contemplated, and all other circumstances, which were left to its consideration and disposition. (The author adds this note: "This merits remark, because in several countries in which previous authorization was required for anonymous associations and for the associations of *commandite par action* the laws contained in themselves numerous restrictive rules to which all these associations were bound to submit.") As a matter of fact, however, the council of state adopted a system of rules (*jurisprudence*), in the light of which it required or rejected always, or nearly always, certain clauses of the by-laws. The administration could retract the authorization it had given, which it commonly did when an association violated its by-laws. For certain associations the administration named supervisors charged with the duty of overseeing their proceedings. The authorization necessary for creating the association was likewise required for all modifications afterwards made in the by-laws."

---

#### EXHIBIT B.

#### SPECIAL ACT OF JULY 1, 1893 (FRANCE), RELATIVE TO THE LIQUIDATION OF THE OLD PANAMA CANAL COMPANY.

##### *An Act Relative to the Liquidation of the Universal Company of the Panama Interoceanic Canal.*

The Senate and the Chamber of Deputies have adopted and enacted, and the President of the Republic promulgates, the following law:

ART. 1. From the date of the promulgation of the present law, all actions now in course of procedure that have been brought by holders



of bonds issued by the Universal Company of the Panama Interoceanic Canal, or that have been brought by any creditors of the said Company, whether against the liquidator in his official capacity, or against the Administrators to enforce their responsibility, or against third parties for restitution, or arising in any other manner whatsoever, are hereby declared suspended. The plaintiff may follow up and prosecute said actions only by complying with the requirements of articles 2 and 3 hereof.

All proceedings concerning attachments and execution, even those now in course of enforcement and procedure, against the personal or real property of the said company, are likewise suspended.

# I.

## BOND OR OBLIGATION HOLDERS' ATTORNEY.

ART. 2. All rights of action, of any character whatever, accruing to owners of bonds emitted by the Universal Company of the Panama Interoceanic Canal, whether against the liquidator in his official capacity, or against the administrators to enforce their responsibility, or for a right to restitution arising from any other cause, shall be enforced and sued on by an attorney or mandataire appointed for the purpose, on request of the Attorney of the Republic for the jurisdiction of the Civil Tribunal of the Seine, by a decree in Chambers.

In case there should arise a divergence or opposition of interests between the different classes of bondholders, one or more special mandataires may be appointed in the manner and form just above provided. The powers of the mandataires may be revoked at the same request and in the same manner. There shall be no appeal from or recourse against said orders or decrees.

However, any bondholder shall have the right to enter an action for damages in connection with a criminal matter, or to intervene in proceedings instituted by the attorney or mandataire aforesaid, at his own expense and cost, without in any way delaying the proceedings or judgment.

Moreover, every bondholder shall have the power to bring any action, in his individual right and at his own risk and peril, which the attorney shall have refused or failed to enter within one month after he shall have been notified and requested to enter the same.

Suits brought by the attorneys or mandataires shall not block the right of action on the part of the Company, belonging to the liquidator. The attorneys shall have power to call on the liquidator for communication of all documents tending to shed light on the facts; their legal residence shall be the jurisdiction within which shall be carried on the winding up or liquidation of the company's affairs; the tax costs arising from the exercise of their official duties shall be defrayed from the credits of the liquidation, so far as this may be done without impairing the reimbursement to the latter of the sums which it shall have advanced.

ART. 3. All actions emanating from the liquidator, or from the attorneys, or from interested parties individually, shall be brought before the Civil Tribunal of the Seine. Such proceedings as may arise from the distribution of the assets shall be brought likewise before this tribunal. Suits instituted by parties intervening in damages shall remain in the jurisdiction where already the prosecution has been inaugurated.

ART. 4. The mandataire shall have of right the "judicial assistance privilege" in the carrying on of actions and in the executing of decisions which he shall have obtained. Likewise he shall enjoy the same in all interventions asking for damages, and in the case of all recording-taxes which might be otherwise exacted. On his request, presented to the Attorney of the Republic, advocates and bailiffs shall be appointed, in the manner and form prescribed by article 13 of the law dated January 22nd, 1851.

However, the "judicial assistance privilege" shall not extend to costs of transportation for judges, for Government officials or for experts, nor to the latter's fees, nor to witness fees. As to stamp duties, costs of recording and court costs in general, the Treasury shall exact them from the debtor only, after the payment of such judgment as shall have been obtained by the mandataire.

ART. 5. The mandataire shall have power to compromise or to desist from an action, though he may do so only after consulting with three jurists appointed by the Attorney of the Republic; and all compromises or withdrawals of actions shall have to be ratified and approved by judicial decree rendered in Chambers.

He alone shall have power to levy execution on judgments pronounced by the Court, or to receive the sums obtained on compromise, whether such compromise have been obtained on his own demand or on that of obligation holders acting in an individual capacity; all sums thus received shall be deposited by him at the bureau of deposits and consignments, and the liquidator shall give him due quittance therefor.

## II.

### THE LIQUIDATOR.

ART. 6. Before proceeding at all to distribute the assets of the company, the liquidator shall publish in the "Journal Officiel" and in the "Journal Officiel (Commune edition)" a notice, calling on all parties interested to produce their claims against the company and their proofs thereof, within the space of six months, under pain of becoming barred from bringing any action on the said claims.

The production of the claims and the transmission of proofs in support thereof may be made by simple registered letter.

ART. 7. The liquidator shall proceed to verify and to admit said claims in the manner and form prescribed by articles 495 and 497, first paragraph, of the Code of Commerce.

ART. 8. Should the claim be contested, notice of this fact shall be sent

by registered mail to the claimant in question, and the latter shall have a term of three months within which he must institute proceedings before the Civil Tribunal of the Seine, in order to have his claim adjudicated.

Judgment must be pronounced thereon within the space of one month, as in the case of matters demanding immediate and summary adjudication. An appeal from such decision must be entered within ten days from the notification of said judgment either to the party in person or at his domicile.

ART. 9. The distribution of all dividends arising from an action brought by the company or from actions brought by the attorney or mandataire of bondholders, or from any other source whatever, shall be made by the liquidator, who alone shall have competency to receive opposition or objections to the same.

ART. 10. All acts tending to alienate the assets of the company, all contracts entailing a transfer or contribution of the whole or of a part of the assets of the concern, emanating from the liquidator of the Universal Company of the Panama Interoceanic Canal, shall be subject to the approval of the Civil Tribunal of the Seine, which shall, on the report of one of the Justices, pass on the question in open Court.

ART. 11. All decrees of approval rendered in accordance with the preceding article shall be published, within a term of ten days, in the "Journal Officiel" and in the "Journal Officiel (Commune edition)".

This decree may be attacked by the shareholders, by the mandataire of the bondholders, and by the other creditors of the company, within a delay not exceeding one month from the date of the publication aforesaid. The Civil Tribunal shall adjudicate the question within the space of one month, as in the case of matters demanding an immediate and summary adjudication. The appeal from such decision must be entered within ten days from the time of notification of said judgment to the party in person or at his domicile.

ART. 12. The Universal Company of the Panama Interoceanic Canal, the civil company formed for the purpose of redeeming the obligations or bonds of the Panama Canal (issue of March, 1888), and the civil or non-trading company for the redemption of the lottery bonds of the Panama Canal, are hereby exempted from the payment of all stamp duties, and of all transfer or transmission taxes now due or to become due on any shares or bonds of the said companies.

ART. 13. Beginning with the date of the promulgation of the present law, no limitation in bar of actions in damages shall begin to run against the creditors of the Panama Canal Universal Company, until the complete distribution of the assets realized.

ART. 14. Shareholders, subscribers or buyers of stock having acquired title to the same before the company was placed into the hands of a liquidator, provided they represent at least one-twentieth of the capital stock, may join a common interest and entrust one or more attorneys or mandataires with maintaining any action and with representing them in Court.

The present law, deliberated upon and adopted by the Senate and Chamber of Deputies, shall be enforced as a law of the State.

Done at Marly-le-Roi, on the 1st day of July, 1893.

CARNOT.

By the President of the Republic:

The Keeper of the Seals, the Minister of Justice,

E. GUERIN.

The Minister of Finance,

P. PEYTRAL.

---

**EXHIBIT C.**

**CONCESSION OF 1878 AND EXTENSIONS.**

**WYSE CONCESSION, MARCH 20, 1878.**

[Diario Oficial of Bogota, Wednesday, May 22, 1878.]

**CONTRACT FOR THE CONSTRUCTION OF AN INTEROCEANIC CANAL ACROSS  
COLOMBIAN TERRITORY.**

Eustorgio Salgar, secretary of the interior and of foreign relations of the United States of Colombia, duly authorized, of the one part, and of the other part Lucien N. B. Wyse, chief of the Isthmus Scientific Surveying Expedition in 1876, 1877, and 1878, member and delegate of the council of administration of the International Interoceanic Canal Association, presided by General Etienne Türr, in conformity with powers bestowed at Paris, from the 27th to the 29th of October, 1877, which he has exhibited in legal form, have celebrated the following contract:

**ARTICLE 1.** The Government of the United States of Colombia grants to Mr. Lucien N. B. Wyse, who accepts it in the name of the International Interoceanic Canal Association, represented by their council of administration, the exclusive privilege for the construction across its territory, and for the operating of a canal between the Atlantic and Pacific oceans. Said canal may be constructed without restrictive stipulations of any kind.

This concession is made under the following conditions:

1st. The duration of the privilege shall be for ninety-nine years from the day on which the canal shall be wholly or partially opened to the use of the public, or when the grantees or their representatives commence to collect the dues on transit and navigation.

2d. From the date of approbation by the Colombia Congress of the present contract for the opening of the interoceanic canal, the Government of the Republic can not concede to any company or individual, under any consideration whatever, the right to construct another canal across Colombian territory which shall connect the two oceans, nor construct one itself. Should the grantees wish to construct a railroad as an auxiliary to the canal, the Government (with the exception of existing rights) cannot grant to any other company or individual the right to

build another interoceanic railroad, nor do so itself, during the time allowed for the construction and use of the canal.

3d. The necessary studies of the ground and the route for the line of the canal shall be made at the expense of the grantees by an international commission of individuals and competent engineers, in which two Colombian engineers shall take part. The commission shall determine the general route of the canal and report to the Colombian Government directly, or to its diplomatic agents in the United States or Europe, upon the results obtained, at the latest in 1881, unless unavoidable circumstances clearly proven should prevent their so doing. The report shall comprise in duplicate the scientific labors performed and an estimate of the projected work.

4th. The grantees shall then have a period of two years to organize a universal anonymous company, which shall take charge of the enterprise and of the construction of the canal. This term shall commence from the date mentioned in the preceding paragraph.

5th. The canal shall be finished and placed at the service of the public within the subsequent twelve years after the formation of the company which will undertake its construction, but the executive power is authorized to grant a further maximum term of six years in the case of encountering vis major, and if after one-third of the canal is built, the company should find it impossible to conclude the work in the said twelve years.

6th. The canal shall have the width, depth, and all other conditions requisite in order that sailing vessels and steamships measuring up to 140 meters long, 16 meters in width, and 8 meters in draught shall, with lowered topmast, be able to pass the canal.

7th. All public lands which may be required for the route of the canal, the ports, stations, wharves, moorings, warehouses, and in general for the construction and service of the canal, as well as for the railway, should it be convenient to build it, shall be ceded gratis to the grantees.

8th. These lands shall revert to the Government of the Republic, with the railroad and canal, at the termination of this privilege; there is also granted for the use of the canal a belt of land two hundred meters wide on each side of its banks throughout all the distance which it may run, but the owners of lands on its banks shall have free access to the canal and its ports as well as to the right of use of any roads which the grantees may open there; and this without paying any dues to the company.

9th. If the lands through which the canal shall pass, or upon which the railroad may be built, should, in whole or in part, be private property, the grantees shall have the right to demand their expropriation by the Government according to all the legal formalities in such cases. The indemnity which shall be made to the landowners, and which shall be based on their actual value, shall be at the expense of the company. The grantees shall enjoy in this case, and in those of temporary occupation of private property, all the rights and privileges which the law allows to the nation.

10th. The grantees may establish and operate at their cost the telegraph lines which they may consider useful as auxiliaries in the building and management of the canal.

11th. It is, however, stipulated and agreed that if, before the payment of the security determined upon in article 2, the Colombian Government should receive any formal proposal, sufficiently guaranteed, in the opinion of the said Government, to construct the canal in less time and under more advantageous conditions for the United States of Colombia, said proposal shall be communicated to the grantees or their representatives, that they may be substituted therein, in which case they shall be preferred; but if they do not accept such substitution, the Colombian Government, in the new contract which they may celebrate, shall exact, besides the guarantee mentioned in article 2, the sum of three hundred thousand dollars in coin, which shall be given as indemnity to the grantees.

ART. 2. Within the term of twelve months from the date at which the international commission shall have presented the definite results of their studies, the grantees shall deposit in the bank or banks of London, to be designated by the national executive power, the sum of seven hundred and fifty thousand francs, to the exclusion of all paper money, as security for the execution of the work. The receipt of said banks shall be a voucher for the fulfillment of said deposit. It is understood that if the grantees should lose that deposit by virtue of the stipulations contained in clauses 2 and 3 of article 22 of the present contract, the sum referred to, with interest, shall become *in toto* the property of the Colombian Government. After the completion of the canal, said sum, without interest, which latter will in this case belong to grantees, shall be paid into the treasury, for the expenses which may have been incurred or may be incurred for the construction of buildings for the public services.

ART. 3. If the line of the canal to be constructed from sea to sea should pass to the west and to the north of the imaginary straight line which joins Cape Tiburon with Garachiné Point, the grantees must enter into some amicable arrangement with the Panama Railroad Company, or pay an indemnity, which shall be established in accordance with the provisions of law 46, of August 16, 1867, "approving the contract celebrated on July 5, 1867, reformatory of the contract of April 15, 1850, for the construction of a railroad from one ocean to the other through the Isthmus of Panama."

In case the international commission should choose the Atrato or some other stream already navigable as one of the ends of the canal, the ingress and egress by such stream, and the navigation of its waters, so long as it is not intended to pass through the canal, shall be open to commerce and free from all imposts.

ART. 4. Besides the lands granted in paragraphs 7 and 8 of article 1 there shall be awarded to the grantees, as an aid for the accomplishment of the work, five hundred thousand hectares of public lands, with the mines they may comprise, in the localities which the company may select. This award shall be made directly by the national executive

power. The public lands situated on the seacoast, on the borders of the canal or of the rivers, shall be divided in alternate lots between the Government and the company, forming areas of from one to two thousand hectares. The measurements for the allotment or locating shall be made at the expense of the grantees and with the intervention of Government commissioners. The public lands thus granted, with the mines they may hold, shall be awarded to the grantees as fast as the work of construction of the canal progresses, and in accordance with rules to be laid down by the executive power.

Within a belt of two myriameters on each side of the canal, and during five years after the termination of the work, the Government shall not have the right to grant other lands except the said lots until the company shall have called for the whole number of lots granted by this article.

ART. 5. The Government of the Republic hereby declares the ports at each end of the canal, and the waters of the latter from sea to sea, to be neutral at all times; and consequently in case of war among other nations, the transit through the canal shall not be interrupted by such event, and the merchant vessels and individuals of all nations of the world may enter into said ports and travel on the canal without being molested or detained. In general, any vessel may pass freely without any discrimination, exclusion, or preference of nationalities or persons on payment of the dues and the observance of the rules established by the company for the use of the canal and its dependencies. Exception is to be made of foreign troops, which shall not have the right to pass without permission from Congress, and of the vessels of nations which, being at war with the United States of Colombia, may not have obtained the right to pass through the canal at all times, by public treaties wherein are guaranteed the sovereignty of Colombia over the Isthmus of Panama and over the territory whereon the canal is to be cut, and the immunity and neutrality of the said canal, its ports, bays, and dependencies and the adjacent seas.

ART. 6. The United States of Colombia reserve to themselves the right to pass their war vessels, troops, and munitions of war at all times and without paying any dues whatever. The passage of the canal is strictly closed to war vessels of nations in a state of open hostility with one or more other nations, and which may not have acquired, by public treaty with the Colombian Government, the right to pass through the canal at all times.

ART. 7. The grantees will enjoy the right during the whole time of the privilege to use the ports at the termini of the canal, as well as intermediate parts, for the anchorage and repair of ships, and the loading, depositing, transshipping, or landing of merchandise. The ports of the canal shall be open and free to the commerce of all nations, and no import duties shall be exacted, except on merchandise destined to be introduced for the consumption of the rest of the Republic. The said ports shall, therefore, be open to importations from the commencement of the work, and the custom-houses, and the revenue service

which the Government may deem convenient for the collection of duties on merchandise destined for other parts of the Republic, shall be established, in order to prevent introduction of smuggled goods.

ART. 8. The executive power shall dictate, for the protection of the financial interests of the Republic, the regulations conducive to the prevention of smuggling, and shall have the power to station, at the cost of the nation, the number of men which they may deem necessary for that service.

Out of the indispensable officials for that service, ten shall be paid by the company, and their salaries shall not exceed those enjoyed by employes of the same rank in the Barranquilla custom-house.

The company shall carry gratis through the canal, or on the auxiliary railway, the men destined for the service of the nation, for the service of the state through whose territory the canal and railroad may pass, or for the service of the police, with the object of guarding against foreign enemies, or for the preservation of public order, and shall also transport gratis the baggage of such men, their war materials, armament, and clothing which they may need for the service assigned to them.

If the company has not ships or tugboats it will pay the passage of these same men across the Isthmus with their baggage, munitions, arms and equipment.

The subsistence of the public force which may be deemed necessary for the safety of the interoceanic transit shall likewise be at the expense of the company.

ART. 9. The grantee shall have the right to introduce, free of import or other duties of whatever class, all the instruments, machinery, tools, fixtures, provisions, clothing for laborers which they may need during all the time allowed to them for the construction and use of the canal. The ships carrying cargoes for the use of the enterprise shall enjoy free entry at whatever point shall afford them easy access to the line of the canal.

ART. 10. No taxes, either national, municipal, of the State, or of any other class, shall be levied upon the canal, the ships that navigate it, the tugs and vessels at the service of the grantees, their warehouses, workshops, and offices, factories of whatever class, storehouses, wharves, machinery or other works or property of whatever character belonging to them, and which they may need for the service of the canal and its dependencies, during the time conceded for its construction and operation. The grantees shall also have the right to take from the public lands the materials of any kind which they may require without paying any compensation for the same.

ART. 11. The passengers, money, precious metals, merchandise, and articles and effects of all kinds which may be transported over the canal shall also be exempt from all duties—national, municipal, transit, and others. The same exemption is extended to all articles and merchandise which may be deposited, on conditions to be stipulated with the company, in the storehouses and stations belonging to them in the case of interior or exterior commerce.



ART. 12. Ships desiring to pass through the canal shall present at the port of the terminus of the canal at which they may arrive their respective registers and other sailing papers prescribed by the laws and public treaties, so that the vessels may navigate without interruption. Vessels not having said papers, or which should refuse to present them, may be detained and proceeded against according to law.

ART. 13. The Government allows the immigration and free access to the lands and plants of the grantees of all the employés and workmen of whatever nationality, who may be contracted for the work or who may come to engage themselves to work on the canal, on condition that such employés or laborers shall submit to the existing laws and to the regulations established by the company. The Government promises them support and protection, and the enjoyment of their rights and guarantees, in conformity with the national constitution and laws, during the time they may sojourn on Colombian territory.

The Colombian manual laborers and other workmen employed on the work of the canal shall be exempt from all requisitions and military service, national as well as of the state.

ART. 14. In order to indemnify the *grantees* of the construction, maintenance, and working expenses incurred by them, they shall have, during the whole period of the privilege, the exclusive right to establish and collect for the passage of the canal and its ports the dues for light-houses, anchorage, transit, navigation, repairs, pilotage, towage, hauling, storage, and of moorage according to the tariff which they may issue, and which they may modify at any time under the following express conditions:

1st. They shall collect these dues, without any exceptional favor, from all vessels in like circumstances.

2d. The tariffs shall be published four months before their enforcement in the *Diario Oficial* of the Government, as well as in the capitals and the principal commercial ports of the countries interested.

3d. The principal navigation dues to be collected shall not exceed the sum of ten francs for each cubic meter resulting from the multiplication of the principal dimensions of the immersed hull of the ship in transit (length, breadth, and draught).

4th. The principal dimensions of the ship in transit, that is to say, the maximum exterior length and breadth at the water line, as well as the greatest draught, shall be the metrical dimension inserted in the official permits of navigation, excepting any modifications supervening during the voyage. The ship's captains and the company's agents may demand a new measurement, which operations shall be carried out at the expense of the petitioner; and,

5th. The same measurement, that is to say, the number of cubic meters contained in the parallelepipedon circumscribing the immersed hull of the ship, shall serve as a basis for the determination of the other accessory dues.

ART. 15. By way of compensation for the rights and exemptions which are allowed to the grantees in this contract, the Government of the

Republic shall be entitled to a share amounting to five per cent of the gross receipts obtained by the enterprise, by virtue of the rights established or which will be established in conformity with article 14, during the first twenty-five years after the opening of the canal to the use of the public. From the twenty-sixth up to the fiftieth year, inclusive, it shall be entitled to a share of six per cent; from the fifty-first to the seventy-fifth to seven per cent; and from the seventy-sixth to the termination of the privilege to eight per cent. It is understood that these shares shall be reckoned, as has been said, on the gross income from all sources, without any deduction whatever for expenses, interest on shares, or on loans or debts against the company. The Government of the Republic shall have the right to appoint a commissioner or agent, who shall intervene in the collections and examine the accounts, and the distribution or payment of the shares coming to the Government shall be made in due half-yearly installments. The product of the five, six, seven, and eight per cent shall be distributed as follows:

Four-fifths of it shall go to the Government of the Republic and the remaining one-fifth to the government of the State through whose territory the canal may pass.

The company guarantees to the Government of Colombia that the share of the latter shall in no case be less than the sum of two hundred and fifty thousand dollars a year, which is the same as that received as its share in the earnings of the Panama Railroad, so that if in any year the five, six, seven, or eight per cent should not reach said sum, it shall be completed out of the common funds of the company.

ART. 16. The grantees are authorized to require payment in advance of any charges which they may establish; nine-tenths of these charges shall be made payable in gold, and only the remaining one-tenth part shall be payable in silver of twenty-five grammes, of a fineness of 900 m.

ART. 17. The ships which shall infringe upon the rules established by the company shall be subject to the payment of a fine which said company shall fix in its regulations, of which due notice shall be given to the public at the time of the issue of the tariff. Should they refuse to pay said fine, nor furnish sufficient security, they may be detained and prosecuted according to the laws. The same proceedings may be observed for the damages they may have caused.

ART. 18. If the opening of the canal shall be deemed financially possible, the grantees are authorized to form, under the immediate protection of the Colombian Government, a universal joint stock company, which shall undertake the execution of the work, taking charge of all financial transactions which may be needed. As this enterprise is essentially international, and for public utility, it is understood that it shall always be kept free from political influences.

The company shall take the name of "The Universal Interoceanic Canal Association;" its residence shall be fixed in Bogota, New York, London, or Paris, as the grantees may choose; branch offices may be established wherever necessary. Its contracts, shares, bonds, and titles of its property shall never be subjected by the Government of Colombia

to any charges for registry, emission, stamps, or any similar imposts upon the sale or transfer of these shares or bonds, as well as on the profits produced by these values.

ART. 19. The company is authorized to reserve as much as 10 per cent of the shares emitted, to form a fund of shares, to the benefit of the founders and promoters of the enterprise. Of the products of the concern the company take, in the first place, what is necessary to cover all expenses of repairs, operations, and administration, and the share which belongs to the Government, as well as the sums necessary for the payment of the interest and the amortization of the bonds, and, if possible, the fixed interest or dividend of the shares; that which remains will be considered as net profit, out of which 80 per cent at least will be divided among the shareholders.

ART. 20. The Colombian Government may appoint a special delegate in the council of administration of the company whenever it may consider it useful to do so. This delegate shall enjoy the same advantages as are granted to the other administrators by the by-laws of the company.

The grantees pledge themselves to appoint in the capital of the Union, near the National Government, a duly authorized agent for the purpose of clearing up all doubts and presenting any claims to which this contract may give rise. Reciprocally and in the same sense, the Government shall appoint an agent, who shall reside in the principal establishment of the company situated on the line of the canal; and, according to the national constitution, the difficulties which may arise between the contracting parties shall be submitted to the decision of the federal supreme court.

ART. 21. The grantees, or those who in the future may succeed them in their rights, may transfer these rights to other capitalists or financial companies, but it is absolutely prohibited to cede or mortgage them under any consideration whatever to any nation or foreign government.

ART. 22. The grantees, or their representatives, shall lose the right hereby acquired in the following cases:

1st. If they do not deposit, on the terms agreed upon, the sum which by way of security must insure the execution of the work.

2d. If in the first year of the twelve that are allowed for the construction of the canal the works are not already commenced, in this case, the company shall lose the sum deposited by the way of security, together with the interest that may have accrued, all of which will remain for the benefit of the Republic.

3d. If at the end of the second period fixed in paragraph 5 of Article 1 the canal is not transitible, in this case also the company shall lose the sum deposited as security; which, with the interests accrued, shall remain for the benefit of the Republic.

4th. If they violate the prescriptions of Article 21; and,

5th. If the service of the canal should be interrupted for a longer period than six months without its being occasioned by the acts of God, &c.

In cases 2, 3, 4, and 5 the federal supreme court shall have the right to decide whether the privilege has become annulled or not.

ART. 23. In all cases of decisions of nullity the public lands mentioned in clauses 7 and 8 of Article 1, and such lands as are not settled or inhabited from among those granted by Article 4, shall revert to the possession of the Republic in the condition they may be found in, and without any indemnity whatever, as well as the buildings, materials, works, and improvements which the grantees may possess along the canal and its accessories. The grantees shall only retain their capital, vessels, provisions, and in general all movable property.

ART. 24. Five years previous to the expiration of the ninety-nine years of the privilege the executive power shall appoint a commissioner to examine the condition of the canal and annexes, and, with the knowledge of the company or its agents on the Isthmus, to make an official report, describing in every detail the condition of the same and pointing out what repairs may be necessary. This report will serve to establish in what condition the canal and its dependencies shall be delivered to the National Government on the day of expiration of the privilege now granted.

ART. 25. The enterprise of the canal is reputed to be of public utility.

ART. 26. This contract which will serve as a substitute for the provisions of law 33, of May 26, 1876, and the clauses of the contract celebrated on the 28th of May of the same year, shall be submitted for the approval of the President of the union and the definite acceptance by the Congress of the nation.

In witness whereof they sign the present in Bogotá, on the 20th March, 1878.

EUSTORGIO SALGAR.

LUCIEN N. B. WYSE.

BOGOTÁ, March 23, 1878.

Approved.

The President of the union:

AQUILEO PARRO.

The secretary of the interior and of foreign relations:

EUSTORGIO SALGAR.

*To the Honorable Secretary of the Interior and Foreign Relations:*

I have the honor to inform you that I accept each and all of the modifications introduced by Congress to the contract which I celebrated with Señor Eustorgio Salgar, your worthy predecessor in the department of the interior and foreign relations, for the construction of the inter-oceanic canal, which contract was approved by the executive power under date of March 23 last.

The modifications to which I have alluded are those recorded in law No. 28 of the 18th instant.

I hasten to lay this declaration before the Government of Colombia,

so that it may be taken in consideration, in order that said law may be effective in all its parts.

Bogota, May 18, 1878.

LUCIEN N. B. WYSE,

*Chief of the International Scientific Commission  
for the Survey of the Isthmus, Member and Dele-  
gate from the Council of Administration of the  
Interoceanic Canal Association.*

### EXTENSION OF CONCESSION DECEMBER 26, 1890.

ADDITIONAL CONTRACT MODIFYING THAT OF MARCH 23, 1878, APPROVED BY LAW 28  
OF THE SAME YEAR.

[Law 107 of 1890—December 26.]

*Extension of ten years for the opening of the interoceanic canal across  
Colombian territory.*

THE CONGRESS OF COLOMBIA, *Decrees:*

ONLY ARTICLE. The contract modifying that of March 23, 1878, for the opening of an inter-oceanic canal across Colombian Territory, concluded between H. E. the Minister of Foreign Affairs, and Mr. Lucien N. B. Wyse, Special Representative of the Liquidator of the Compagnie Universelle du Canal de Panama, is approved in all its parts, which contract is literally as follows:

Antonio Roldan, Minister of Foreign Affairs, duly authorized by his Excellency, the President of the Republic, hereinafter called the "Government," of the one part, and Lucien N. B. Wyse, Naval Commander, Engineer, original Concessionary of the inter-oceanic canal, and Special Delegate of the Liquidator of the Compagnie Universelle du Canal de Panama, under powers of attorney executed at Paris, May 16, 1890, hereinafter called the "Concessionary," of the other part, have agreed to modify the Contract of March 28, 1878, for the opening of an inter-oceanic canal across Colombian Territory, approved by law 28 of the same year, in accordance with the following stipulations:

ARTICLE FIRST: The Government grants to the Liquidator of the Compagnie Universelle du Canal de Panama, an extension of ten years, within which the canal is to be finished and put in public operation; the said extension is consented to, subject to the following conditions:

*First.* The Concessionary agrees to transfer all the assets of the Company in liquidation to a new company which shall undertake the completion of the work of the Inter-oceanic Canal.

*Second.* The new company shall be formally organized with a capital sufficient for this purpose, and shall resume the work of excavation in a serious and permanent manner, not later than February 28, 1893.

*Third.* The Concessionary, or his successors, shall furnish monthly to

the National Government of Panama the sum of ten thousand (10,000) piastres, in Colombian coin of 0.835, for the maintenance of two hundred and fifty (250) men of the Military Garrison of the Department of Panama, whom the Government undertakes to assign for the preservation of order, and for the security of the line of the canal during the work of excavation, and upon its termination for the protection of inter-oceanic transit.

In case the Company should have need of a greater number of men of the public forces, the government will assign them to said service, taking them from the Military Garrison of the Department, but the additional expense occasioned by this increase, reckoned upon the basis already established, shall also be borne by the Company.

The company binds itself to furnish places for the lodging of the troops upon points on the line at which the Government has none of its own. The last part of article 8 of the original contract for the privilege is modified in these respects.

*Fourth.* The navigation of the lakes which may form part of the canal shall be free to small vessels, in accordance with the regulations which the company may prescribe for this purpose. The latter shall not be responsible for the inherent risks of this navigation. The internal regulation of the lakes shall be settled by the Government at the proper time, taking into account the general interests of the enterprise.

*Fifth.* The company binds itself to reestablish public transit at the mouth of the Rio Grande, by means of bridges or boats, as it shall consider most practicable, and if, in consequence of the number of vessels, passage should become hereafter too difficult, the company shall reestablish it between Emperador and Arraijan to the satisfaction of the Government.

**ARTICLE SECOND.** Beside the public lands granted gratis by the contract of 1878, the expropriation of lands, buildings, and plantations which shall prove necessary to the canal and its dependencies, shall be made by the Government on account of the company in conformity with the 9th condition of article first of the aforesaid contract, approved by law 28 of 1878.

Such expropriations shall be made with all speed which the legislation of the country upon the subject permits; the expropriated real estate shall be immediately delivered over to the concessionary or his successors.

**ARTICLE THIRD.** The Government also undertakes to take the necessary steps for restoring to the new company the complete enjoyment of the lands belonging to the company in liquidation unlawfully occupied by private persons, and to procure a judicial decree that all persons who, without previous consent, shall have built or planted upon the lands bought by the company in liquidation for the purpose of works of excavation, installation, and unloading, shall have no right to any indemnity.

**ARTICLE FOURTH.** As compensation for the services which the Government agrees to render, in accordance with the two preceding articles,

the concessionary, or his successors, shall pay to the Government ten million (10,000,000) francs in gold, and shall issue to it gratis, in addition, five million (5,000,000) francs in ten thousand (10,000) dividend bearing shares of the new company of five hundred (500) francs each, full paid, having the right to no other dividends than those which are declared on ordinary shares; the said ten thousand (10,000) shares shall remain attached to their respective stubs until the other shares shall be full paid; but, upon notice to the company, the Government shall have the power, when it shall see fit, to assign or pledge them.

The ten million (10,000,000) francs to which this article refers shall be paid by the concessionary, or by his successors, in five (5) equal annual installments; the first being paid three (3) months after the new company for the completion of the canal shall be fully organized, in conformity with the second condition of article first. From this sum shall be deducted two million five hundred thousand (2,500,000) francs, as well as the interest accrued up to the date of the present contract, which the Government owes to the company in liquidation for the loan of 1883, the deduction being made in the first place for the purpose of fixing the amount of the five (5) installments just mentioned. By this payment the said loan shall be finally discharged.

ARTICLE FIFTH. A special member, whom the Government has the right to appoint in the company's council of administration in conformity with article twenty of the contract in force, shall enjoy in the new company to be organized for the completion of the canal the same advantages and compensation granted to the other administrators by the charter of the company, but neither the said appointee nor the official agent of the Government residing in the Isthmus, shall make any publication relative to the company without the express authorization of the Government.

ARTICLE SIXTH. If the new company for the completion of the canal shall not be organized, and if the work of excavation on the canal shall not be resumed within the period fixed by the second condition of article first, the contract in force shall lapse and the Republic shall enter into the possession and enjoyment, without the necessity of a previous judicial decree, and without indemnity, of the works of the canal and its annexes, which revert to it in accordance with article third of the contract of 1878.

*Sec. 1st.* It is understood that the contract shall also lapse and the provisions of this article shall become applicable if the company for the completion of the canal not being organized before February 28, 1893, the legal representative of the Compagnie Universelle du Canal Inter-oceanique, or his successors, abandon the maintenance of the works, plant, and buildings now existing upon the Isthmus and belonging to the company.

*Sec. 2nd.* The maintenance of the property specified in the preceding paragraph shall be considered abandoned when the legal representative of the Compagnie Universelle du Canal Inter-oceanique, in liquidation, or his successors, shall discharge the force of employees which he now

has on the Isthmus, or shall cease to make the necessary expenditure for preventing the loss or deterioration of the said property.

*Sec. 3rd.* It is, moreover, understood that the buildings, plant, works, and improvements which are to become the property of the Republic under the circumstances provided in this article, and in conformity with article 23 of the contract of 1878, shall be inalienable, and are to be in good condition, subject to deterioration arising from use, from unavoidable causes, or from accident.

ARTICLE SEVENTH. As soon as the company for the completion of the canal shall be legally organized, and shall have resumed the work, in conformity with the provisions of the second condition of article first of this contract, the Government shall assign to it in the department of Panama the two hundred and fifty thousand (250,000) hectares of public lands to which it has been already declared by decisions of the Executive power to be entitled, and shall issue to it the respective patents, provided that the legal formalities in the premises be accomplished on the part of the company.

ARTICLE EIGHTH. The security of seven hundred and fifty thousand (750,000) francs deposited by the canal company in accordance with article second of the contract in force, shall be maintained as a guaranty for the fulfillment of the obligations arising from the said contract, and of those assumed by the concessionary under the provisions of the present contract.

ARTICLE NINTH. All rights and obligations created by the contract of March 23, 1878, for the opening of an interoceanic canal across Colombian territory, approved by law 28 of the same year, shall continue in full force and vigor without other restrictions and modifications than those contained in the present contract.

ARTICLE TENTH. In order that the present contract may have full force and effect, it shall be submitted to the approval of His Excellency the president of the Republic, and to that of Congress.

Done in duplicate, at Bogotá, the 10th day of December, one thousand eight hundred and ninety.

ANTONIO ROLDAN.

LUCIEN N. B. WYSE.

---

#### EXTENSION OF CONCESSION, APRIL 4, 1893.

##### CONTRACT OF EXTENSION.

---

[Diario Oficial of Bogota, April 5, 1893—No. 9125.]

---

*Contract granting extension to the Panama Canal Company—in liquidation.*

Between MARCO F. SUAREZ, Minister of Foreign Affairs, duly authorized by his excellency, the Vice-President of the Republic, and in



accordance with the powers granted to the Executive Power by Law 91 of 1892, hereinafter called "the Government," of the one part,

And FRANCOIS MANGE, Engineer, Administrator of the operations of the liquidation on the Isthmus, Special Representative of the Liquidator of the Compagnie Universelle du Canal de Panama, under powers of attorney granted him at Paris, January 24, 1893, hereinafter called "the Concessionary," of the other part; it has been agreed to modify the contracts of March 23, 1878, and December 10, 1890, for the opening of an inter-oceanic canal across Colombian Territory, in conformity with the following stipulations:

#### ARTICLE FIRST.

The extension of ten years granted in Article First of the Contract of 1890 to the Liquidator of the Compagnie Universelle du Canal de Panama, remains in force, subject to the conditions then provided, except the Second, which is modified by the extension until October 31st, 1894, of the period within which the new Company is to be formed and work on the Canal is to be resumed in a serious and permanent manner.

The term of ten years shall begin to run from the date of the formal organization of the new Company.

#### ART. 2.

The Concessionary or his successor acknowledges the validity of the former contracts and of the present contract and binds himself to do, in France, all acts necessary to insure its validity. These proceedings are to be concluded not later than August 31st next.

#### ART. 3.

As compensation for the extension which the Government grants by Article First and to indemnify it for the advantages which it relinquishes accordingly, the Concessionary or his successor acknowledges an indebtedness in favor of the Republic, amounting to the sum of Two million francs in gold (2,000,000 francs), which added to the Ten millions provided in Article 4 of the Contract of 1890, constitutes a total indebtedness of Twelve million francs (12,000,000 francs), in favor of Colombia, exclusive of Five million francs (5,000,000 francs) in Ten thousand shares, also mentioned in the Article aforesaid.

#### ART. 4.

The contracting parties further agree that from the Twelve millions which have just been mentioned in the preceding Article shall be deducted the sum of Four million francs which the Colombian Government and the Treasury of the Department of Panama owe to the Company in liquidation for the loan of 1883 and its interest and for services and material furnished to the administration of this Department from 1881 to 1892. Accordingly, this debt becomes finally extinguished, leaving the Republic free from all obligation with regard to this matter,

and reducing to Eight million francs in gold (8,000,000 francs), the sum which the new Company is to pay to the Government.

ART. 5.

The eight million francs mentioned in the preceding Article shall be paid by the Concessionary or his successor in the following manner:

150,000 francs August 31st, 1893;  
150,000 francs October 31st, 1893;  
200,000 francs December 31st, 1893.

The remainder shall be paid in four annual instalments, the first to be paid three months after the new Company for the completion of the Canal shall be formally organized. The first of these instalments shall be One million five hundred thousand francs (1,500,000 francs) and the three others, Two millions each (2,000,000 francs).

ART. 6.

The Republic shall enter into possession and ownership, without need of previous judicial decision and without any indemnity, of the Canal itself and the annexes dependent thereon, in conformity with the contracts of 1878 and 1890, in each of the following cases:

If the new Company shall not be organized within the period fixed by Article First;

If the work shall not be resumed within the period fixed by the same Article;

If the Liquidator sells the property which is to belong to the Republic in case of lapse or abandons its maintenance, all in conformity with the provisions of the previous contracts, saving and excepting deterioration arising from use, unavoidable causes or from accident;

If the inventory mentioned in Article 7 of the present contract shall not be made.

If the conditions of Article 2 of the same contract shall not be fulfilled.

ART. 7.

A general inventory of the property of the Company in liquidation, which shall comprise as well the property which is to belong to the Government in case of lapse, as that which is to belong to the Company in liquidation, shall be prepared upon the Isthmus. It is understood that rolling stock and floating plant shall be comprised in this inventory, which is to be made in conjunction with the Agent of the Government at Panama, and is to be completed not later than August 31st, 1893.

ART. 8.

The security of Seven hundred and fifty thousand francs (750,000 francs) deposited in conformity with the contract of 1878, by the Canal Company, and confirmed by the contract of 1890, shall be maintained

as a guarantee for the fulfillment of the obligations arising from the said contracts and those to which the Concessionary agrees by the present contract.

## ART. 9.

Disputes which may arise between the contracting parties with regard to the present contract or the former contract, shall be submitted to the Supreme Court of Justice of Colombia.

In conformity with the provisions of Article 7 of law 145 of 1888, the Concessionary waives the right to diplomatic intervention concerning the duties and rights arising from the three contracts, except in case of denial of justice.

## ART. 10.

All rights and obligations arising from Contract of March 23rd, 1878 and contract of December 10th, 1890 for the excavation of an inter-oceanic canal across Colombian Territory, approved by law 28 of 1878, and by law 107 of 1890, shall continue in full force and vigor, without other modifications than those provided in the present contract.

## ART. 11.

The Concessionary declares that he accepts all the provisions of the present contract which impose special obligations upon the Liquidator as well as those which affect the Company which may be formed.

## ART. 12.

The present Contract must, in order to be valid, be approved by His Excellency, the Vice-President of the Republic.

Done, in duplicate, at Bogota, the fourth day of April, one thousand eight hundred and ninety-three.

MARCO F. SUAREZ.

FRANCOIS MANGE.

EXECUTIVE GOVERNMENT—BOGOTA, April 4, 1893.

Approved.

[L. s.] M. A. CARO.

The Minister of Foreign Affairs,

MARCO F. SUAREZ.

## EXTENSION OF CONCESSION, APRIL 26, 1900.

[Number 11278. "Diario Oficial" Bogota, May 7, 1900. Ministry of Finance.]

*Contract relative to the granting of an extension of time to the New Company of the Panama Canal.*

WHEREAS, The National Executive Power has issued the following Decree Number 721 of 1900.

(April 23.)

by which provision is made for the granting of an extension of time to the New Company of the Panama Canal,

The President of the Republic

Having seen the memorial by which the New Company of the Panama Canal has solicited of the Government an extension of six years for the completion of the work and putting it into public service;

and having seen the communications in which the Special Agent, Dr. Nicolas Esquerro, expounds to the Government to public expediency of granting the extension herein considered,

“ Decrees

ART. 1. The Government may grant to the New Company of the Panama Canal an extension for the fixed term of six years to complete the work and put it into public use, Provided that it shall deposit at the disposition of the National Treasury, within one hundred and twenty days, computed from the date on which this instrument shall be notified to the said Company in such bank or establishment as may be designated by the Government, five millions of francs (frs. 5,000,000) in French gold.

ART. 2. The said extension will begin to run on the 31st day of October, 1904. Consequently the canal must be completed and put into public use on the 31st day of October, 1910, at the latest.

Let it be communicated and published.

Given at Pena, Department of Cundinamarca, this 23d day of April, 1900.

The Minister of State,  
The Minister for Foreign Affairs,  
The Minister of Finance,  
The Minister of War,  
The Minister of Public Instruction,  
The Minister of the Treasury,

MANUEL A. SANCLEMENTE.  
RAFAEL M. PALACIO.  
CARLOS CUERVO MARQUEZ.  
CARLOS CALDERON.  
JOSÉ SANTOS.  
MORCO F. SUAREZ.  
MARCELIANO VARGAS.

Now, therefore, we, to-wit: Carlos Calderon, Minister of Finance of the Republic, duly authorized by the Executive Power, on the one part, and, on the other part, Alejandro N. Mancini, in his capacity of Agent of the New Company of the Panama Canal and as representative of the same, by virtue of the power of attorney which he has laid before the Ministry of Finance, have executed the following contract.

ART. 1. The Government of the Republic grants to the New Company of the Panama Canal a delay of six years, from the 31st of October, 1904, in which to complete the work on the Canal and deliver it to the public service, under the terms of the existing contracts. In consequence the said work shall have to be completed and put into the public service on the 31st day of October, 1910.

ART. 2. In consideration of the extension referred to in the foregoing article, the New Company of the Panama Canal will pay to the Republic the sum of five millions of francs (francs 5,000,000) in French coin, in the city of Paris, ninety days from the date on which this contract shall have been approved by the Most Excellent President of the Republic. Said payment shall be made by the Company to the firm or bank in the city of Paris in whose favor the Minister of the Treasury of the Republic may draw.

ART. 3. This contract requires the approval of the Council of Ministers and that of the Most Excellent President of the Republic.

In witness whereof, we have signed three copies of even tenor at Bogata, this twenty-fifth day of April, one thousand nine hundred.

CARLOS CALDERON—ALEJANDRO N. MANCINI.

Presidency of the Council of Ministers, Bogata,  
April 25, 1900.

In the session of this day the foregoing contract was examined and unanimously approved.

The President, CARLOS CUERVO MARQUEZ,

The Secretary *ad hoc*, ALEJANDRO M. OLIVARES.

National Executive Power: Pena Department of Cundinamarca,  
April 26, 1900.

Approved.

MANUEL A. SANCLEMENTE.

The Minister of Finance,

CARLOS CALDERON.

#### EXHIBIT D.

#### EVIDENCE OF PAYMENTS TO COLOMBIA SINCE DECEMBER 31, 1893.

Sec. 1, No. 1550.]

REPUBLIC OF COLOMBIA,

THE MINISTRY OF TREASURY,

*Bogotá, September 12, 1896.*

THE DIRECTOR OF THE NEW PANAMA CANAL COMPANY,

*Paris.*

On the 31st day of October proximo deliver to the Messrs. Schloss & Bros., of London, two million francs (fr. 2,000,000), being the annual payment due January, 1897. Said delivery will be made in accordance with the contract between the Government of this Republic and the company you represent as administrator, respecting anticipated discount and formalities required in making the annual payment due. (1896.)

Your most obedient servant,  
(Signed.)

MANUEL PONCE DE LEON.

Certified to be a copy of the original.

The chief of the general accounts,

MARIE.

Sec. 1, No. 7139.]

REPUBLIC OF COLOMBIA,

MINISTRY OF TREASURY,

*Bogotá, May 28, 1900.*

Mr. ALEJANDRO MANCINI:

For your information I beg to transmit the following communication and the resolution pertaining to same:

Sec. 1, No. 159.]

REPUBLIC OF COLOMBIA, MINISTRY OF WAR,

*Bogotá, May 26, 1900.*

The MINISTER OF THE TREASURY:

In conformity with authorization received from His Excellency the President of the Republic, communicated through the minister of state

in the telegram I had the honor to transcribe for you in my official note No. 155, dated the 22d instant, I beg to state that this ministry notified the banking house of Fould & Co., of Paris, to accept as a deposit the five million francs, French gold, which is to be paid by the New Panama Canal Company for the concession of "prolongation," as I had the honor of informing you, for the conclusion of the business.

I am, sir, your obedient servant,

MANUEL CASABIANCA.

Sec. 1.]

MINISTRY OF TREASURY,

*Bogotá, May 26, 1900.*

Instruct the representative of the New Panama Canal Company in this city and inform the banking house of Fould & Co. to receive the consignment without discount or commission.

By the minister, the secretary:

IGNACIO R. PIÑEROS.

Your obedient servant.

By the minister in charge:

The subsecretary,

(Signed)

IGNACIO R. PIÑEROS.

Certified to be a copy of the original.

The chief of the general accounts,

MARIE.

---

EXHIBIT E.

BY-LAWS OF THE OLD PANAMA CANAL COMPANY.

TITLE FIRST.—*Creation and object of the company, denomination, residence, and duration.*

ARTICLE 1. There is created, between Mr. Ferdinand de Lesseps, the conferees, and the subscribers to shares hereafter created, a company under the denomination of the "Universal Interoceanic Panama Canal Co."

ARTICLE 2. This company has for object:

First. The construction of a maritime canal for large navigation between the Atlantic and Pacific oceans, through the part of the American isthmus belonging to the United States of Colombia.

Second. The exploitation of the said canal and sundry enterprises belonging thereto.

Third. The construction or exploitation of all lines of railroad which the company should deem for the good of the undertaking to be constructed or brought in the vicinity of the canal.

Fourth. The exploitation of lands conceded and mines contained therein.

The whole according to the clauses and conditions of the concession, such as result from the law of the Congress of the United States of Colombia dated May 18th, 1878. (Law 28 of 1878.)

ARTICLE 3. The office of the said company is in Paris, temporarily No. 7 Rue Saint Florentin, at the domicile of Mr. Ferdinand de Lesseps, and hereafter in such locality as the board of directors may select.

ARTICLE 4. The company commences to date from the day of its final creation. Its duration shall be equal to that of the concession; that is to say, ninety-nine (99) years, to be reckoned from the day when the canal will be opened in whole or in part to the public service, or when the grantee company will commence to receive tolls for transit and navigation.

TITLE SECOND.—*(Contribution, social capital, share, and payments.*

ARTICLE 5. In virtue of the conditions agreed upon between him and the International Civil Company of the Interoceanic Canal, grantee of said canal, Mr. Ferdinand de Lesseps brings to the company, with a guarantee of right in the matter:

First. The concession to this civil company by the Government of the United States of Colombia of the exclusive privilege for the excavation through its territory and for the exploitation of a maritime canal between the Atlantic and Pacific oceans, with all its advantages, as also with all its charges stipulated by the law of Congress of the United States of Colombia dated 18th of May, 1878. (Law 28 of 1878.)

Second. All surveys, work, and documents appertaining to the said grantee company relative to the line and the project submitted to the International Congress of Study of the Interoceanic Canal.

Third. The benefit of all the agreements which the said grantee company has obtained from the council of administration of the Panama Railroad Company.

The company will be the owner of this contribution from the date of its final creation. It will be substituted, starting from this date, to all the rights and obligations resulting from the law of concession of United States of Colombia.

ARTICLE 6. In view of this contribution, in order to conform to the obligation which Mr. Ferdinand de Lesseps has had to assume to assure to the company hereby created the said contribution, there is allotted to the civil company the beneficiary of the law of concession of May 18th, 1878.

First. One million (1,000,000) of francs, cash, to be paid within fifteen (15) days from date of the final creation of the said company.

Second. Four millions (4,000,000) of francs, cash, payable without interest in the month which will follow the date fixed by the council of administration of the present company for the payment of the sum which will complete the liberation of one-half of the shares subscribed, which will be hereafter mentioned.

Third. And five millions (5,000,000) of francs, the value of ten thousand (10,000) shares, five hundred (500) francs each, of the said company, entirely liberated.

These ten thousand (10,000) shares entirely liberated will be the property of the grantee civil company, starting from the final creation

of the present company, but they shall not be delivered and shall be of no profit to them, except under the reservations following.

Up to their delivery, which will be regulated and determined, they will be registered in the names of those having rights to the civil company, and will remain attached to the stub with the effect of a pledge for the exclusive guarantee of the authenticity of the law of concession and of the claims that a third party might bring against the civil company for services rendered. The civil company may exact the remittance of said shares to the rightful claimant, either when the subscribed shares will be liberated entirely or when the company hereby created shall have called either upon its shares or by means of a loan for the payment of a total capital of five hundred millions (500,000,000) of francs.

These ten thousand (10,000) shares, though they may be entirely liberated, or if they remain attached to the stub, or that they may be detached in the above foreseen case before the entire liberation of the shares subscribed, will not have any right to interest or dividend, except on the same conditions of other subscribed shares, so that during the period of the construction of the canal they will have no right to an interest of 5 per cent only upon the amount of capital called for on the subscribed shares and as fast as installments are called.

While these ten thousand (10,000) shares remain attached to the stub the interest or dividends which may be due will be paid to the holders upon special certificates which will be delivered to them in conformity to the model which may be determined by the council of administration of the company hereby created.

The delivery of the securities and money by the company will take place for the benefit of the civil company in the terms agreed between Mr. Ferdinand de Lesseps and the said civil company.

ARTICLE 7. On the other hand to organize the present company and to prepare its creation in 1879, as well as in 1880, Mr. Ferdinand de Lesseps has had to make an appeal for capital and the help of persons devoted to the creation of this enterprise.

The accounts of expenses made or pledged for, previously to the final creation of the company, will be presented at the first general meeting of shareholders and submitted for the approbation of the second meeting, and after approbation the amounts of these expenses will become a company debt.

Besides, the present by-laws will stipulate hereafter, under article 60, with such reserve as therein expressed for the benefit of sundry persons whose capital and help have served to the creation of the present company, 15% upon the net profits of the enterprise.

The apportionment of this 15% shall be made under the care of Mr. Ferdinand de Lesseps in the terms agreed between him and his auxiliaries.

ARTICLE 8. The company's capital, made up of contributions in nature and in cash capital, is fixed at three milliards of francs, and divided in six hundred thousand shares of 500 francs each.

Ten thousand shares being allotted to the grantees for representation



of their contribution, there shall be issued five hundred and ninety thousand shares cash.

ARTICLE 9. The amount of each share is payable in cash at the rate of exchange in Paris, in the company's office or to the representatives of the company which will be designated for subscription by the appearing founder and in the future by the council of administration.

Twenty-five francs shall be paid immediately upon each share at the time of subscription and one hundred francs more shall be paid after its close.

The three hundred and seventy-five francs in addition shall remain in reserve, and will only be called subsequently to the time and in the proportion which will be fixed by the council of administration.

No payments shall be made previous to a call for funds.

They will be made in conformity to calls of the council by means of advertisement, three months in advance in one of the Paris newspapers authorized to receive legal advertisements, and in foreign newspapers which may be selected by the council of administration.

ARTICLE 10. The first payment will be acknowledged by a nominative receipt which during the six months commencing from the creation of the company will be exchanged against a certificate also nominative.

All following payments to be made except the last will be mentioned upon this temporary certificate.

The last payment shall be made against the delivery of a final share, nominative or to bearer, at the option of the holder.

However, shares half paid may be converted into shares to bearer by resolution of a general meeting.

ARTICLE 11. The council of administration will determine the form and style of the share certificates.

Temporary certificates will be detached from the stub of a register; they will be in numerical order and will be stamped with the dry seal of the company; they will be signed by two administrators or by an administrator and a delegate from the council of administration.

ARTICLE 12. All subscriptions on which the second payment completing the first quarter shall not have been made at the time set upon for its call shall be considered null and void without legal notice and with full right.

The first payment becomes the property of the company as damages.

ARTICLE 13. In default of payment of the other installments at the time determined, interest will be due for each day of delay at the rate 5 per 100 per year.

The company besides will have the right to have such shares sold upon which payments are in arrear.

To this effect the numbers of such shares will be published as in default in one of the newspapers of Paris designated to receive legal notices.

Two months after such publication the company, without any demand in due form of law and without any subsequent formality, shall have the right to proceed with the sale of the said shares for the account of and at the risk and peril of the defaulter.

Such sale will be made upon duplicates one or several times at the Paris Bourse or at London through the agency of a stock broker.

The previous certificates of shares thus sold shall become null by full right by the fact of the sale; there shall be delivered to the purchasers new certificates which will bear the same numbers and will be the only ones valid.

In consequence all shares not bearing the regular mention of installments to be paid cease to be negotiable.

The stipulations prescribed in the present and the preceding article do not prevent the simultaneous use by the company of ordinary means of right, if deemed useful, against the delinquent shareholders.

ARTICLE 14. The money received from the sales made in virtue of the preceding article, deducting expenses and interest, is imputed in the terms of right upon what is due by the expropriated stockholder or by his transferees who remain responsible for the difference, if there is any deficit, and who are benefited by the excess if excess there be.

ARTICLE 15. The council of administration may authorize the deposit and the preservation of the shares to bearer in the company's hands. In such a case it will determine the form of nominative certificates of deposit, the conditions of their delivery, and the guarantees with which the execution of such measure should be surrounded in the interest of the company and the shareholders.

ARTICLE 16. The transfer of shares to bearer is made by a simple exchange of the certificates.

For receipts and nominative shares the exchange will be made by a declaration of transfer signed by the transferrer and the transferee, or their substitutes, upon registers to be kept in the office of the company or of those of its representatives designated for that purpose by the council of administration wherever needed.

The company may require that the signature of the parties should be duly certified.

ARTICLE 17. Each share carries a right to a proportional part in the property of the company's assets.

ARTICLE 18. Every share is indivisible; the company will recognize but one owner for each share.

ARTICLE 19. The rights and obligations attached to a share follow the certificate held in any hand.

The possession of a share carries with it full right of adhesion to the by-laws of the company and to the resolutions of the general meeting of the stockholders.

ARTICLE 20. The heirs or creditors of a stockholder under any pretext whatever can not cause the affixing of seals upon the real estate, the values, or revenue of the company, nor ask for their division or their public sale, nor to interfere in any manner in its management. They shall for the exercise of their rights rely upon the company's inventories and the annual account approved by the general meeting of the stockholders.

ARTICLE 21. The stockholders shall be responsible only to the amount of the capital of their shares beyond which any call for funds is prohibited.

*TITLE THIRD.—Council of administration.*

ARTICLE 22. The company will be managed by a council of eighteen members at least and twenty-four members at most, taken from among the shareholders.

A committee selected from its midst will be specially charged with the management of the business of the company.

ARTICLE 23. Owing to their functions the administrators shall not contract any personal or joint obligations; they are only liable for the execution of their duties.

ARTICLE 24. The administrators shall be appointed by the general meeting of stockholders.

However, the first council of administration shall be composed of twenty-four persons, of whom the names are following and who shall accept such functions of administrator before the final completion of the company, viz:

Ferdinand de Lesseps, presiding manager of the Suez Canal Company; Allavene, Charles François Hubert, retired general; De Cicourt, Anne Marie Joseph Albert; Charles Cousin, principal inspector representative of the Northern Railways; Daubree, Jean Baptiste Emmanuel, administrator in the Suez Canal Company; Marius Fontana, general secretary of Suez Canal Company; Delagarde, Harel, Jules Herbette, Max Hellman, of the firm of Seligman Frères et Cie.; Baron Jules de Lesseps, administrator of the Suez Canal Company; Charles Aime de Lesseps, administrator of the Suez Canal Company; Victor de Lesseps, administrator of the Suez Canal Company; De Mondesir, Paul Antoine Theodore, administrator of the Suez Canal Company; Monet-Bey, Theodore Antoine, administrator of the Suez Canal Company; Mourette, Edme Constant Charles Vincent, administrator of the Suez Canal Company; Theodore Motet, Adolph Peghoux, administrator of the Suez Canal Company; Baron Poisson, administrator of the Company of Deposits and Accounts Current; Ernest Prevost, Piat, William Seligman, of the firm of Seligman Frères et Cie.; General Etienne Turr, Dauprat, Louis Jules Eugene, administrator of the Suez Canal Company.

This first council is appointed for three years; the appointment will not be submitted to the general meeting for organizing the company. At the end of the three first years it will be in whole submitted to a reelection.

ARTICLE 25. Commencing from this time the administrators shall be appointed by the general meeting of the shareholders for six years at the utmost.

Consequently so long as the council will be composed of eighteen or twenty-four members it shall be renewed every year by one-sixth until the entire renewal of the council has decided the order of rotation. The outgoing members will be selected annually by drawing lots.

The outgoing administrators may be reelected.

If the number of administrators selected by the general meeting should become less than twenty-four and above eighteen, the general meeting which would thus decide the number of administrators shall have to determine the manner of their renewal and the duration of their functions.

ARTICLE 26. In case of vacancy arising from resignation or death temporary provision shall be made for the vacancy to be filled by the council of administration up to the time of the next general meeting of the stockholders.

The administrators thus selected shall only remain in power during the time remaining of the period of their predecessors.

The first council appointed as above under article 24 during the time of its function shall have the faculty to complete or to renew itself, if need be, up to the number of twenty-four members, subject to confirmation by the next general meeting.

It is well understood that the latter members shall only remain in power up to the expiration of the third financial year.

ARTICLE 27. Each administrator must be the owner of one hundred shares, nominatives, unalienable, stamped with a seal showing their unalienability, and they shall remain in the hands of the company during the whole time of his functions.

These shares are pledged as a guarantee for all acts during the management, even of such as would be exclusively personal to one of the administrators.

ARTICLE 28. A share of three per cent in the net annual profits shall be allowed to the administrators on account of their trouble and care under the reservations mentioned in article 60 hereafter.

During the time of the work and, if need be, during the first years following the opening of the maritime canal to large navigation, there shall be allowed to the administrators in place of the 3 per cent stipulated hereabove, an annual allowance which shall be included in the expenses of management, the amount of which shall be fixed by the second general meeting of the stockholders who organized the company.

The council of administration shall decide the special allowance which is to be made to the members of the committee out of this sum or from the three per cent of profits.

ARTICLE 29. The council of administration will elect each year from among its members one president and three vice-presidents.

The president and vice-presidents can always be reelected.

In case of absence of the president and the vice-presidents, the council will designate at each meeting which of its members shall fill the position.

ARTICLE 30. The council of administration will meet at least once a month. It shall also meet upon the call of the president as often as the interest of the company may require.

The decisions shall be adopted by a majority of the members present.

In case of a tie the vote of the president will be the casting vote.

At least seven administrators shall be present to validate the resolutions of the council.

When seven administrators only are present, the resolutions to be valid shall be carried by a majority of five votes.

None can vote in the council by proxy.

ARTICLE 31. The general secretary of the company shall be present at the meeting of the council of administration, with the privilege of consultation.

ARTICLE 32. The decisions of the council of administration shall be recorded in minutes signed by the president and a member present at the meeting.

The copies or extracts of the minutes to be valid at law or elsewhere should be certified by two administrators.

ARTICLE 33. The council of administration shall have the utmost powers to insure the construction of the canal, for the management of the company, and for the choice and exploitation of the domainal lands ceded by paragraphs 7 and 8 of article 1, and by article 4 of the law of concession.

They may ask for all new concessions, make agreements with third parties for the purchase of concerns or of concessions having relation to any of the purposes of the company.

They will fix the rules of order of the general meetings; they shall examine the accounts submitted to the general meeting; they shall make a report to the general meeting upon the accounts and the state of the business of the company.

They shall fix the dividends temporarily, and determine, if need be, the advances to be paid on January 1st upon the dividend of the period closed by the inventory of June 30th preceding.

They shall decide upon the propositions of the committee concerning the following, viz:

First. Call for cash from stockholders.

Second. Temporary investment of funds on hand.

Third. Surveys and schemes, plans and estimates for carrying out the work.

Fourth. Contracts by the job.

Fifth. Purchases, sales, and exchanges of personal property and real estate, purchase of ships or machinery necessary for the execution of the work and the management of the enterprise.

Sixth. Annual budgets.

Seventh. Fixing and modifying rights of all nature to be received in virtue of the concession, the conditions, and mode of collecting tolls.

Eighth. Disposal of the reserve funds.

Ninth. Disposal of the funds for pensions, help, and encouragement to the employees.

Tenth. Regulations for deposits of the shares and bonds of the company.

And generally shall do for the best interest of the company all that they may deem useful or necessary.

ARTICLE 34. The council shall appoint from its members those who are to be a part of the committee.

They may delegate to one or several administrators, to officers, employees of the company, or to others, part or all of their power by special authority for one or more transactions or determined purposes.

TITLE FOURTH.—*Committee.*

ARTICLE 35. The committee shall be composed of the president of the council of administration and six members at the most of the council of administration.

The powers of members of the committee will last for the same period as those they possess as members of the council of administration.

ARTICLE 36. The committee will meet as often as necessary for the good management of the business and at least once a week.

In order to make its work valid there shall be at least three members present.

All resolutions shall be adopted by a majority of the members present.

In case of a tie, the vote of the president of the council, if present, shall be the casting vote.

ARTICLE 37. Minutes of the meeting of the committee shall be kept. These minutes shall be signed by two members present at the meeting.

The extracts from such minutes to be valid in courts or elsewhere shall be certified to by two members of the committee.

ARTICLE 38. The committee shall have full power for the management of the business of the company.

They shall provide for the execution of the obligations imposed by the law of concession and the by-laws, as also for the resolutions adopted by the general meeting and the decisions of the council of administration.

They shall submit to the council of administration propositions relating to the purposes defined in article 33.

They shall represent the company and shall act in its name by one or more of its members in all cases where a special decision does not require the intervention of the general meeting of the stockholders or of the council of administration. They especially shall dismiss employees, determine their functions and attributes, fix their compensation and gratuities.

They shall regulate the work of the offices, prescribe the regulations and order of business, and will order and regulate expenses. They shall sign all correspondence, all notes, endorsements, contracts, drafts, transfer of "rentes," public securities, and values belonging to the company.

They shall decide upon all bargains, agreements, except contracts by the job for the whole of the work; they will authorize awards; make all purchases of furniture; authorize all rentals and leases.

They will attend to the collection of tolls, the recovery of all moneys due, will sign all receipts and discharges; they will decide all withdrawals of mortgages, seizure, injunctions, and other hindrances, with

all abandonments of privilege, of mortgages or action for cancellation, the whole before or after payment.

They may agree, compound, compromise, plead as prosecutor or defendant, but judiciary proceedings are to be directed by or against the president of the council of administration.

In consequence the legal notices shall be served and received by the president of the council at the company's office.

The decisions of the committee, the acts and agreements approved by them, shall be signed by the president or by one of the members of the committee designated for that purpose.

ARTICLE 39. The committee by authenticated power of attorney can delegate to one or more administrators, to officers of the company, employees, or others the power to sign all acts and agreements mentioned hereabove.

#### TITLE FIFTH.—*Commissaires.*

ARTICLE 40. The general meeting of the stockholders shall appoint one or more commissaires, together or separately, invested with the functions which devolve upon them by law.

In case of absence of one of the commissaires the one or those who remain will proceed by themselves.

#### TITLE SIXTH.—*General meetings of stockholders:*

ARTICLE 41. A general meeting regularly organized shall represent the universality of all the shareholders.

ARTICLE 42. The general meeting shall be composed of all stockholders, owners of at least twenty shares.

It will be regularly organized when the stockholders present will represent one-quarter of the capital.

ARTICLE 43. If upon a first call the stockholders do not fill the conditions specified hereabove to validate the resolutions of the general meeting, the meeting by right shall be adjourned and the adjournment shall not be less than a month.

A second call shall be made in the manner prescribed by article 45 hereafter.

The resolutions of the general meeting of this second call shall only bear upon questions of the proceedings of the first meeting; such resolutions will be valid whatever the proportion of capital represented by the stockholders may be.

ARTICLE 44. The general meeting shall be held each year and day and at the place designated by the council of administration before June 30.

There will be an extraordinary meeting besides as often as the council of administration shall deem it advisable.

ARTICLE 45. The ordinary and extraordinary calls are made by means of a notice inserted at least one month in advance in one of the Paris newspapers designated for receiving legal notices, and also in all other foreign papers designated by the council of administration.

ARTICLE 46. Stockholders in order to have the right to attend or to be represented at the general meeting shall have to show proof at the office of the company at least five days before the meeting that they have deposited their certificates at the company's office, or at the office of a representative of the company designated for that purpose by the council of administration.

Deposits made under such conditions shall give the right for nominative card of admission.

Stockholders of nominative certificates or certificates of deposit have also the privilege to be represented at general meetings by proxies having regular power, the form of which shall be determined by the council of administration.

The proxies shall deposit their power of attorney at the office of the company within a time to be fixed by the council of administration for each meeting.

No one can act as proxy for a stockholder unless he is himself a member of the meeting.

ARTICLE 47. The general meeting shall be presided over by the president or one of the vice-presidents of the council of administration, and in their absence, by an administrator selected by the council.

The two largest stockholders present at the time of the opening of the meeting, and who will accept, shall be appointed as scrutators.

The president shall appoint the secretary.

ARTICLE 48. The resolutions at general meetings shall be adopted by a majority of votes of the members present or regularly represented.

In case of a tie the vote of the president shall be the casting vote.

ARTICLE 49. Twenty shares give the right to one vote, but the same stockholder can not possess more than ten votes, either as shareholder or as proxy.

ARTICLE 50. Secret ballots may be requested by ten members.

ARTICLE 51. The resolutions of the general meetings shall be recorded in minutes signed by the president, by the scrutators, and by the secretary.

The copies or extracts of these minutes in order to be valid before courts of justice or elsewhere shall be certified by two administrators.

ARTICLE 52. In each general meeting a tally sheet of those present shall be kept. It shall contain the names and residences of the shareholders and the number of shares held by each. This sheet shall be certified by the officers of the meeting and shall remain at the office of the company.

ARTICLE 53. The order of business of the meeting shall be decided by the council of administration.

No other question than that mentioned in the order of business shall be discussed.

ARTICLE 54. The general meeting will receive the report of the council of administration upon the company's business.

The report of the commissaires shall also be read upon the situation



of the company and upon the condition and of the accounts presented by the council of administration.

The accounts shall be discussed and if need be shall be approved.

The dividends to declare shall be decided.

Vacancies of administrators and commissaires shall be filled.

A vote shall be taken, if need be, for the increase of the company's capital up to the amount of 300 millions, and for carrying it, if need be, to the amount of 600 millions.

Such increase of capital shall not be made unless the first stockholders are given the right of preference.

All loans by means of issues of bonds or by means of mortgages or by any other means shall be voted for.

Accounts for first installation shall be settled after the execution of the work. Meetings shall decide upon propositions made by the council of administration.

They shall consider and decide sovereignly upon all the interest of the company, and shall confer all supplementary useful powers needed upon the council of administration.

ARTICLE 55. The resolutions of a general meeting adopted according to the by-laws bind all stockholders, even such as are absent or disagreeing.

#### TITLE SEVENTH.—*Statement of finances—Inventory.*

ARTICLE 56. The financial year will commence July 1st and end June 30th.

The first statement of receipts and expenditures will include the time between the final organization of the company and the following June 30th.

ARTICLE 57. The council of administration shall make every quarter a summary statement of the resources and liabilities of the company.

This statement to be accessible to the commissaires.

There shall be made up, moreover, at the end of each financial year an inventory showing the value of assets and liabilities and all the active and passive debts of the company.

Such inventory to be reported to the general meeting.

#### TITLE EIGHTH.—*Annual accounts—Redemption—Interest—Reserve fund—Dividends.*

ARTICLE 58. During the execution of the work there shall be paid to the stockholders annually interest at 5 per cent upon the amount paid by them in conformity with article 9 here above.

Payment for such interest shall be provided for by temporary investments of funds and other accessories and, if need be, by the company's capital.

ARTICLE 59. The annual revenues of the company shall first be used for cancelling the part stipulated for its benefit to the United States of Colombia according to terms of the law of concession; the expenses of

exploitation and care taking; the expenses for office management and generally for all charges; the interest and redemption of loans which may have been contracted; four-hundredths per cent of the capital applicable to the redemption fund as created by article 63 hereafter; the allotment of one-twentieth upon the profits, after the satisfaction of all the charges here above enumerated, for the creation of a reserve fund; the excess of the annual revenues, the net revenues or profits of the company to be divided.

ARTICLE 60. The net revenues or profits of the company are to be divided in the following manner:

To the shares up to amount of 5 per 100 of their capital by allotment, excepting, however, what will be stated hereafter concerning redeemed shares.

The remainder after this allotment will be divided at the rate of:

80 per 100 to shares.

15 per 100 to founders or beneficiaries mentioned under article 7 hereabove.

3 per 100 to administrators.

And 2 per 100 for the creation of a fund to provide for pensions, help, indemnity, or gratuities granted by the council of administration to employes.

The redeemed shares shall only have a right to the part of the dividend exceeding 5 per 100 of the capital reimbursed on them; all that will represent interest at 5 per 100 of the capital reimbursed shall be paid to the redemption fund, which will be mentioned in article 63 hereafter.

ARTICLE 61. The payment of interest and dividend shall be made to the company's treasurer or to the representatives designated by the council of administration.

The payment of interest is to be made in two periods—the 1st of January and the 1st of July of each year.

The dividend shall be paid on the 1st of July which will follow the vote of the annual general meeting.

However, the administrators when they may judge it deemed may authorize a payment on account of the dividend on the 1st of January preceding.

ARTICLE 62. The dividends and interest unclaimed at the expiration of five years after the time for payment shall be forfeited to the company.

ARTICLE 63. The redemption of the shares shall be accomplished in ninety-nine years, to begin from the starting point of the concession.

Provision is made for this redemption as mentioned in articles 59 and 60 hereabove by means of an annuity of four hundredths per cent of the company's capital and by the sums retained from the dividends of redeemed shares.

The shares to be reimbursed shall be designated by means of drawing lots in public each year at the office of the company at the time and according to the regulations made by the council.

ARTICLE 64. The numbers of shares drawn to be reimbursed shall be posted at the office of the company.

ARTICLE 65. The reimbursement of the shares drawn to be redeemed shall be made at the place selected for the payment of interest and dividends.

The holders of redeemed shares shall possess all the same rights as the holders of shares unredeemed, with the exception of the portion of the dividend representing interest at 5 per 100 of the capital which has been reimbursed to them.

ARTICLE 66. The part allotted to the founders or beneficiaries, designated in article 7 hereabove, from the annual profits of the company shall be represented by special certificates, the nature and style of which shall be determined by the council of administration.

In all cases the provisions of articles 18 and 19 hereabove concerning shares are equally applicable to the certificates of founders or beneficiaries.

ARTICLE 67. The reserve fund shall consist of accumulations of money withdrawn from the annual profits in conformity to article 59 hereabove, and is set aside to meet extraordinary and unforeseen expenses.

When this reserve fund shall attain one-tenth of the capital the allotment intended for its creation shall cease to be applied and shall be added to the dividends to be divided.

In case of insufficiency of the results in one year to allow 5 per 100 per share the difference may be drawn from the reserve fund.

#### TITLE NINTH.—*Changes in by-laws—Liquidation.*

ARTICLE 68. If experience should show the usefulness of making modifications or additions to the present by-laws the general meeting shall proceed to make them in the manner determined by articles 69 and 70 hereafter.

The meeting can especially decide upon—

The reduction of the company's capital or its increase beyond 600 millions.

The extension or the dissolution of the company.

Consolidation with other companies.

All modifications bearing upon the company's object can be made without, however, altering it in its essence.

ARTICLE 69. The general meetings called to deliberate upon the sundry purposes named in the preceding article shall not be regularly organized and their resolutions shall only be valid when they are composed of a number of stockholders representing at least one-half of the capital. But then the council of administration shall have the right, in its calls, to decrease as much as it may deem useful the number of shares held, which shall be sufficient for taking part in the general meetings; and in such a case the holder of a minimum number of shares sufficient to be admitted to the meeting shall have the right to one vote, the holder of ten shares shall have a right to two votes, and the

number of votes will increase at the rate of one vote for each ten shares, whilst the total number of votes for each holder can not be above ten.

ARTICLE 70. It is hereby explained that it is to conform to the French law now in force that the present by-laws require the representation of one-half the company's capital in the general meetings relating to purposes specified in article 68 hereabove and the representation one one-quarter of the capital in the other general meetings.

But it is positively understood that the company would enjoy all benefits derived from all new laws which should decrease the amount of capital necessary to be represented in the general meetings and that all new legislative provisions touching upon this question will become applicable to the company created by these present upon a conform resolution of a general meeting called according to the regulations prescribed by articles 42 and 43 hereabove.

ARTICLE 71. In case of dissolution of the company upon a proposition of the council of administration, the general meeting will determine the mode to be adopted either for dissolution or for the organization of a new company. One or more liquidators shall be appointed, and the most extensive power may be granted to them.

ARTICLE 72. During the liquidation the power of the general meetings will continue as during the existence of the company.

They have especially the right to approve the accounts of the liquidator and give receipt therefor.

The appointment of liquidators will terminate the powers of the administrators and of all proxies.

#### TITLE TENTH.—*Competency of jurisdiction—Controversies.*

ARTICLE 73. In conformity with article 20 of the law of concession, the differences which may arise between the Government of the United States of Colombia and the company shall be submitted to the federal supreme court.

But for all other controversies the company has its domicile in Paris.

ARTICLE 74. Controversies bearing upon the general and collective interest of the company can not be brought either against the council of administration or against one of its members, except in the names of stockholders representing at least one-twentieth of the capital of the company. The social initiative can not belong to a stockholder or to a group of stockholders representing less than one-twentieth of the capital.

And no action at law brought by one or more stockholders against the company, its council of administration, or one of its members can be referred to any tribunal until after it has been examined by the general meeting of the stockholders, the opinion of which will be submitted to the magistrates at the same time as the request itself.

ARTICLE 75. In cases of controversies all stockholders shall select a domicile in Paris and all notices and summons will be validly served to the domicile by him so selected without regard to his real domicile.

Failing to select a domicile such an election shall take place with full

right for judicial or extra judicial notices to the office of the procurator of the Republic at the civil tribunal of first instance of the Seine.

Domicile being selected formally or implicitly, as has been mentioned, will carry with it the competency of jurisdiction of the tribunals of the Department of the Seine.

ARTICLE 76. In all controversies which may arise between the company and third parties all judicial or extra judicial actions must of necessity be served legally upon the company by a single copy in the person of the president of the council of administration and at the office of the company.

TITLE ELEVENTH.—*Transitory provisions.*

ARTICLE 77. The subscription of the company's entire capital and the payment of at least one-quarter of the capital in specie shall be announced by a declaration of Mr. Ferdinand de Lesseps, made by a notarial act.

To this declaration is to be annexed the list of subscribers and the statement of the instalments paid.

ARTICLE 78. Such a declaration with its vouchers shall be submitted at the first regular meeting, when its correctness shall be certified to.

At the same meeting the value of the acquisitions stated above shall be verified and also the cause of the stipulated advantages.

ARTICLE 79. A second meeting shall take place to approve, if need be, the acquisitions and advantages alluded to.

This same meeting for the first period of receipts and expenditures shall appoint commissaires as created by article 40.

The minutes of the meeting will state the acceptance of the administrators and commissaires if they are present at the meeting.

The company shall be organized from the time of their acceptance.

ARTICLE 80. The general meetings held for the creation of the company shall be composed of all the subscribers voting *vira voce*, except that the bearers of several shares are to have a vote for each ten shares, but not to have more than ten votes.

The organizing meeting shall be composed of a number of stockholders representing at least one-half of the capital. The company's capital, one-half of which must be represented for a verification of the acquisitions, shall be composed only of the acquisitions not submitted to verification.

If the general meeting is not composed of a number of stockholders representing one-half of the company's capital, none but temporary resolutions can be adopted. In such a case a new general meeting shall be called. Two notices, published at an interval of eight days, at least one month in advance, in one of the Paris newspapers for legal notices, shall acquaint the stockholders of the temporary resolutions adopted by the first meeting, and such resolutions shall become final if they are approved by the new meeting composed of a number of stockholders representing one-fifth at least of the capital.

ARTICLE 81. All the stipulations of Title VI relative to general meet-

ings and conciliable with those contained under the present title are applicable to organizing general meetings.

ARTICLE 82. The sum of 300 millions proposed by the proponent under article 8 of the present scheme for a company to be the amount of the company's funds is thus fixed temporarily and as a basis for the subscription to be opened.

Consequently if this amount is not subscribed in whole, the subscribers shall be notified for a preparatory meeting to determine if the purpose of the company can or can not be attained with the capital obtained by the subscription, and, in case of the affirmative, to fix in a definite and irrevocable manner the amount of the capital of the company.

To be valid such a decision should be adopted in accord with Mr. Ferdinand de Lesseps.

The subscribers present must then represent one-half of the capital subscribed and voting shall take place by the majority of subscribers present voting *visa voce*.

The capital being thus fixed the formalities for organization enumerated in the preceding articles shall then be gone into.

#### TITLE TWELFTH.—Publication.

ARTICLE 83. During the month of the organization of the company the administrators will deposit at the office of the tribunal of commerce of the Seine and of justice of the peace of the first district of Paris:

First. A copy of the organization of the company.

Second. A copy of the act stating the subscription of the capital and the payment of one-fourth.

Third. A certified copy of the resolutions adopted at the general meeting in virtue of the articles 78 and 79 hereabove.

Fourth. A certified copy of the nominative list of the subscribers, containing their names, surnames, their business, residences, and the number of shares to each.

The same documents shall be posted up in a conspicuous manner in the offices of the company.

ARTICLE 84. During the same time an extract of the acts and resolutions mentioned in the preceding article shall be inserted in one of the Paris journals for legal notices, in conformity with law.

ARTICLE 85. All powers shall be granted to the bearer of the papers for the deposit and publication in question.

ARTICLE 86. Finally Mr. Ferdinand de Lesseps calls attention that all the stipulations contained in the two last preceding titles relative to the organization and to the publications of the present company have only been dictated owing to the exigencies of the French law for stock companies now in force.

He especially reserves the benefits of all new enactments that may be introduced by legislation in the law for the purpose of facilitating the organization of such large enterprises.

**EXHIBIT F.****LAW OF JUNE 8, 1888 (FRANCE), AUTHORIZING THE OLD PANAMA CANAL COMPANY TO ISSUE LOTTERY BONDS.***PARIS, June 8, 1888.***LAW AUTHORIZING THE COMPAGNIE DU CANAL INTEROCÉANIQUE DE PANAMA TO ISSUE SECURITIES REPAYABLE WITH PRIZES.**

The Senate and Chamber of Deputies have adopted, and  
The President of the Republic promulgates a law of the following tenor:

**ARTICLE 1.** The Compagnie Universelle du Canal Interocéanique de Panama is authorized to create, up to six hundred million francs (600,000,000 fr.), an issue of bonds, payable with prizes, by lot, upon the following conditions:

First. The bonds issued shall bear annual interest, the rate of which can not be less than 3 per cent on their par value.

Second. The total annual sum distributed in the form of prizes can not in any case exceed 1 per cent of the par value.

Third. The par value of the bonds issued can not be less than 300 fr.; subsequent division of the bonds issued is forbidden.

Fourth. The payment of this loan in a period of 99 years, at farthest, shall be secured by a sufficient deposit, for this especial purpose, of French Government bonds, or of securities guaranteed by the French Government. The Compagnie Universelle du Canal Interocéanique de Panama, to meet the obligation imposed upon it, is authorized to increase, under the same conditions, the said loan of 600 millions by the sum necessary for the formation of this guaranty fund, this increase of loan not to exceed twenty per cent (20 per cent) of the par of the issue.

**ART. 2.** If the Compagnie Universelle du Canal Interocéanique de Panama should hereafter convert all or any part of its former obligations, the provisions of article 1 shall be applicable to the new securities created by means of this conversion.

**ART. 3.** All material necessary for the completion of the works shall be manufactured in France.

The raw material must be of French origin.

**ART. 4.** All prospectuses, posters, publications, and other documents intended for advertising must bear, in type of the same size as that used for announcing the loan, and below the amount of the loan, the notice:

"Loan authorized in conformity with the provisions of the law of May 21st, 1836, by the law of June 8th, 1888, but without any guaranty or responsibility of the State."

The same notice shall be put at the top of the temporary or permanent certificates issued to subscribers.

Any violation of the above provision will entail the withdrawal of authorization by simple order of the the Minister of Finance.

The present law, considered and adopted by the Senate and by the Chamber of Deputies shall be executed as a law of the State.

Done at Paris, June 8th, 1888.

CARNOT.

By the President of the Republic:

*The Minister of Finance,*

P. PEYTRAL.

---

**EXHIBIT G.**

**JUDGMENT OF DECEMBER 15, 1888 (CIVIL TRIBUNAL OF THE SEINE), APPOINTING PROVISIONAL ADMINISTRATORS OF THE OLD PANAMA CANAL COMPANY.**

[Taken from the minutes of the clerk's office of the civil tribunal of the first instance, department of the Seine, sitting at the palace of justice at Paris.]

The civil tribunal of the first instance, department of the Seine, sitting at the palace of justice at Paris, has rendered, at the session of the chamber of the council of said tribunal, the following judgment:

Session of the 15th of December, 1888.

The tribunal, met in the chamber of the council: upon, first, the request presented by Denormandie, Baudelot, and Hue, signed Denormandie, solicitor, the tenor of which is as follows:

*To the president and judges composing the chamber of council of the first instance of the Seine.*

GENTLEMEN: MM. Denormandie, Baudelot, and Hue, acting in the character of provisional administrators of the company of the Inter-oceanic Canal of Panama, the character of which they have been invested by order of the president of the tribunal, dated the 14th of December of the present month recorded, having domicile at the headquarters of the company, 46 Rue Comartin, at Paris, having for solicitor Me. Denormandie, have the honor to show to you the following:

The 14th of December, present month, an order was made by the president of the tribunal in the following terms, upon the request presented by the Inter-oceanic Canal Company: We, the president, having seen the above request, appoint MM. Denormandie, Baudelot, and Hue provisional administrators of the company of the inter-oceanic canal, with powers the most extensive to carry on and administer provisionally the company, and especially to assure the continuation of the works, and to do these things they are authorized to contract all loans, constitute all pledges, make all payments, enter into all agreements, sign all papers, institute all judicial proceedings, or defend them, and generally to do all acts necessary to the objects of their mission, with the obligation to proceed within fifteen days before the chamber of the council. We order the provisional execution of the present ordinance, even before its being recorded, in case of the existence of any urgency. Done at Paris, in the palace of justice, the 14th of December, 1888.

(Signed)

AUBEPIN.



There is great urgency for the provisional administrators to demand, in conformity with the ordinance above stated, the confirmation of their powers by the president and judges composing the chamber of the council, asking of the tribunal, in confirming their powers, to authorize them to sign all documents, either collectively or individually; to authorize them, besides, to delegate, so far as necessary, all agents and engineers and, generally, all persons, in order to give in the name of the provisional administrators all signatures or fulfill all or part of the mission that you have been pleased to confer upon the appearers. For these reasons, to pass upon the powers conferred upon the provisional administrators by the ordinance of the 14th of December confirming them, and adding the power to sign all documents whatsoever, either collectively or individually, and to authorize them to delegate for the accomplishment of their mission, and to sign in their name all documents necessary of persons as may be deemed advisable. And this will be right.

(Signed)

DENORMANDIE.

Secondly. The ordinance of the president of the tribunal providing: Let this be communicated to the attorney of the Republic in order that, after his conclusions are received, and upon the report which will be made by M. Bourgoin, judge, whom we commission, it may be determined as may be proper.

Done at the palace of justice the 15th of December, 1888.

(Signed)

MASSON.

Thirdly. The conclusions of the public ministry, which are as follows: The attorney of the Republic does not oppose. Submitted the 15th of December, 1888.

(Signed)

FOURNIER.

Fourthly. The divers documents produced. Having heard M. Bourgoin, judge, in his report, and after having deliberated conformably with the law judging in first resort:

Considering that by ordinance dated yesterday, the 14th of December, the president appointed provisional administrators for the Universal Company of the Interoceanic Canal of Panama, Denormandie, Baudelot, and Hue, with the charge of proceeding within fifteen days before the chamber of the council;

Considering that it is necessary to attend to the provisional administration of the said company;

That this measure is required in the interest of the company and of third persons who have dealt with it, and that it is proper to confirm the appointment of the administrators made by the ordinance above referred to, and the powers which are given to them by that ordinance.

Considering that it is proper, besides, to authorize them to sign, collectively and individually, all documents and to give all delegations to all persons either to sign in the name of the provisional administrators or to fulfill the whole or part of their mission;

For these reasons: Confirms the powers conferred on Denormandie, Baudelot, and Hue in their character of provisional administrators of the Universal Company of the Inter-oceanic Canal of Panama by the ordinance aforesaid and in the terms thereof, and by extension gives all powers to the said administrators to sign collectively or individually all documents, and give all delegations to all persons either to sign in the name of the provisional administrators or to fulfill the whole or part of their mission;

Declares that in case of the administrators aforesaid being prevented from acting, they shall be replaced by ordinance of the president of the tribunal, rendered upon simple request.

The present judgment is signed on the minutes by the president, by the reporting judge, and by the clerk.

(Signed)

AUBEPIN, BOURGOIN and FLOQUET.

Done and adjudged in the session of the chamber of the council of the said civil tribunal of first instance, department of the Seine, sitting at the palace of justice, Paris, Saturday, December 15, 1888, by M. Aubepin, president; M. Vanier, vice-president; and M. Bourgoïn, judge. In the presence of M. Sollantin, substitute judge, and M. Fournier, substitute of the Republic, assisted by Floquet, clerk.

Saturday, December 15, 1888.

The minute of the present judgment has been signed by the president, the reporting judge, and the clerk.

On the margin of the minutes of the present judgment is found mention of its being recorded as follows:

"Recorded at Paris the 16th of December, 1888; folio 31, case 3. Received the sum of 9 francs 38 c."

Signed as a copy:

FLOQUET.

---

#### EXHIBIT H.

#### JUDGMENT OF FEBRUARY 4, 1889 (CIVIL TRIBUNAL OF THE SEINE), DISSOLVING THE OLD PANAMA CANAL COMPANY AND APPOINTING A LIQUIDATOR.

[Copy of the judgment of the civil tribunal of the Seine, rendered February 4, 1889, pronouncing the dissolution of the Compagnie Universelle du Canal Interocéanique de Panama and appointing a liquidator.]

#### The Court:

In consideration that the civil or commercial character of a company is recognized, not by the particular form which it takes, but by the nature of the enterprise which constitutes its principal object; that it therefore matters little that the Compagnie du Canal Interocéanique de Panama is a Société anonyme, this circumstance not being enough to impress upon it a commercial character;

Considering that as to its object, according to article 2 of its articles,

it comprises the construction of a maritime canal for deep-water navigation between the Atlantic Ocean and the Pacific Ocean, across the part of the American Isthmus which belongs to the United States of Colombia, as well as the operation of said canal and of the various enterprises which are connected therewith; that in reality the company is formed for the operation of the canal and in view of the profits which it may obtain, and that the construction itself is not the principal aim of the enterprise but only a necessary means for carrying it out;

That the operation can not be assimilated to a transportation business, the company limiting itself to the opening of a new way for navigation upon payment of fixed tolls;

Considering that therefore the company has for its principal object the development of real estate under conditions under which the State of Colombia might have developed it itself if it had not granted the concession to third parties; that it is therefore purely civil, and that on this account, its duration being moreover limited, any one of the associates may apply for its dissolution, in conformity with article 1871 of the civil code;

Considering that the objection would be unavailing that the present application has been made in violation of article 74 of the by-laws, according to which no proceeding at law can be taken by one or more shareholders against the company, its council of administration, or one of the members of the board, until it has been submitted to the examination of the shareholders' meeting, whose opinion is to be submitted to the court at the same time with the action; that on the one hand this provision, which implies a simple opinion to be stated by the shareholders' meeting and not at all a preliminary consent to be given by it, is not of such a character as to be binding upon the court when it is not set up by the defendant; that it could not moreover prevail against the right which every member acquires by article 1871 of the civil code, the protection of which concerns considerations of public policy; that, on the other hand, it appears from the papers in the case that if the special shareholders' meeting of January 26 last could not be legally organized, in spite of the reiterated notices sent to the shareholders, there is no reason to hope that a new call would have a more efficacious result; that thus the plaintiffs would be deprived by the mere force of circumstances, and without possible recourse, of a right which article 1871 of the civil code intended to assure them; that finally the calling of a new meeting would involve, according to the articles, such delays that the corporate interests which are now at stake might suffer irreparable injury;

Considering that the further objection can not prevail that, in accordance with article 68 of the by-laws, the dissolution of the company before its expiration must be voted by a meeting of shareholders, held under special conditions fixed in article 69; that none of the terms of these articles implies the idea that the right in question belongs exclusively to the shareholders' meeting and that the courts are deprived of it; that such a provision would be in contradiction with the principle

laid down in article 1871 of the civil code, and would obviously nullify its objects;

That, furthermore, what was said above relative to the shareholders' meeting of January 26 last and the impossibility of calling to any useful purpose a new meeting within the period fixed by the articles is pertinent here again, and that from every point of view the application should be received;

Considering that, on the merits, article 1871 of the civil code confers upon the court the power of deciding finally whether the company, under the circumstances contemplated, can still continue its normal course, or whether its dissolution is rendered necessary by the very situation in which it is placed; that it is now established that the Compagnie du Canal de Panama has ceased to act in a regular way; that it has suspended payment upon its securities and that the continuation of work on the canal is insured only for a very limited time; that since December 14 last it has been necessary to confide its management provisionally to appointees of the court, who have taken the necessary measures to protect temporarily the important interests connected with its existence; that these wholly provisional measures are now insufficient, or will shortly become so, and that it is important to take action to ward off dangers, the consequences of which would be irreparable;

Considering, therefore, that there is occasion for pronouncing the dissolution of the company and providing for its winding up; that there is occasion also for ordering a provisional execution of the present judgment, notwithstanding appeal, and without security, applying article 135 of the code of civil procedure;

For these reasons,

Pronounces the dissolution of the Compagnie Universelle du Canal Interocéanique de Panama and orders that it be wound up;

Appoints Mr. Joseph Brunet, liquidator of said company with the broadest powers, especially to grant or contribute to any new company all or a part of the corporate assets, to enter into or ratify with the contractors for the Panama Canal all agreements having for their purpose the insurance of the continuance of the works and to this end to contract all loans and form all sinking funds;

Declares that in case the liquidator appointed can not act provision will be made for replacing him in the ordinary way;

Authorizes him henceforth to apply in the same way for all special powers which may be necessary for the performance of his duties, and, if he thinks fit, for the addition of one or more liquidators;

Orders provisional execution of the present judgment, notwithstanding appeal and without security;

Condemns the defendant company to the expenses.

**EXHIBIT I.****BY-LAWS OF THE NEW PANAMA CANAL COMPANY.****NEW PANAMA CANAL COMPANY. CHARTER.****TITLE I.—*Formation and Object of the Company; Name; Principal Office; Duration.***

ARTICLE 1. There is formed between the present founder and the subscribers to the shares hereinafter created a commercial joint-stock company under the name of the *Compagnie Nouvelle du Canal de Panama*, in conformity with the acts of July 24, 1867, and August 1, 1893.

ART. 2. This company has for its objects (1) the completion of the maritime ship canal between the Atlantic and Pacific oceans; (2) the exploitation of the said canal and of the various enterprises connected therewith; (3) the construction and exploitation of all lines of railway within the vicinity of the canal and the management of all interests which the company may possess and acquire in lines already constructed; (4) the exploitation of lands granted and of mines therein contained.

All under the clauses and conditions of the concession as fixed by the act of the Congress of the United States of Colombia, dated May 18, 1878 (law 28 of 1878), and of the extensions of the concession dated December 26, 1890 (law 107 of 1890), and April 4, 1893.

ART. 3. The principal office of the company is at Paris, provisionally fixed at No. 63 *bis*, Rue de la Victoire, and hereafter at such place as the council of administration shall designate.

ART. 4. The company shall begin from the date of its formal organization. Its duration shall be the same as that of its concession—that is to say, ninety-nine years from the date when the canal shall be open in whole or in part for public service or when the company shall begin the collection of dues for transit and navigation.

**TITLE II.—*Contributions; Capital; Shares; Payments.***

ART. 5. A party to these presents is M. Jean Pierre Gautron, judicial administrator of the civil tribunal of the Seine, residing at No. 13 Rue Tronchet, Paris,

“Acting as and in the capacity of sole liquidator of the *Compagnie Universelle du Canal Interocéanique de Panama*, by virtue of the powers conferred by judgment of the civil tribunal of the Seine, dated February 4, 1889,”

M. Gautron, appointed to said office of liquidator by a judgment of the *Chambre du Conseil* of the civil tribunal of the Seine, dated July 21, 1893, in his said capacity contributes to the company:

First. All rights accruing to the company in liquidation from the

laws of the Government of the United States of Colombia, dated May 18, 1878, and December 26, 1890, as well as from any decrees, acts, or things whatever which have occurred in the execution of these laws, with all the advantages provided by these laws, together with all lands and real estate granted to the company in liquidation, or acquired by it,

All subject to the fulfillment of the conditions of the laws and extensions of the concessions, and to the payment of all sums remaining due from the liquidator to the Colombian Government;

Second. The works executed and under execution, workshops, buildings, hospitals, plant, erected and not erected, materials and supplies, etc., belonging to the *Compagnie Universelle du Canal Interocéanique* in liquidation, as well as all deposits as security made by said company in liquidation;

Third. The plant, estimates, studies, documents of every nature, collected by the *Compagnie Universelle du Canal Interocéanique*, relating in any manner to the study, execution, or exploitation of the canal or its dependencies, as well as the benefit of all agreements with all third persons;

Fourth. The rights of every nature, part interests, and generally any others whatsoever, which may belong to the *Compagnie Universelle du Canal Interocéanique* in liquidation, in the railroad from Panama to Colon, operated by an American company called the Panama Railroad Company, whose principal office is at New York, as said rights are enjoyed and exist; M. Gautron, as liquidator, binding himself to transfer the same to the present company in the form required by the laws of the United States of America;

In such manner moreover as the said rights and properties are enjoyed and exist and in the condition in which they are.

The present company shall be the owner of the property and rights granted and contributed from the date of its formal organization, except as hereinafter provided with respect to the Panama Railroad.

This grant and contribution are made by M. Gautron with the reservations and subject to the conditions hereinafter expressed, to wit:

First. There shall be appropriated to the liquidator 60 per cent of the net profits of the enterprise, as these profits shall be determined under articles 51 and 52 hereof.

Second. There shall be appropriated 50,000 shares, full paid, on account of those now issued to the Government of the United States of Colombia, in accordance with the extension law of December 26, 1890.

Third. The rights of every nature in the Panama Railroad, belonging to the estate in liquidation and contributed by M. Gautron under section 4 of this article shall become the property of the present company from and after the stockholders' meeting provided for by article 75 hereof, without any pecuniary compensation, but upon the express condition that the canal be constructed within the time fixed by the agreement of concession. Upon default in completion within such time, said rights shall revert to the estate in liquidation.

If, contrary to all expectation, the meeting in question should not

take the necessary action for the completion of the canal, or if the course of action adopted by the meeting can not be carried out, the said rights in the railroad shall remain the property of the present company, but it shall pay into the estate in liquidation the sum of 20,000,000 francs by way of indemnity, and the share of profits set apart or the estate in liquidation shall be half the profits of the present company, without other deductions than those provided in sections 2 and 3 of article 51 hereof.

Accordingly said rights shall remain inalienable in the hands of the new company until either the payment of said sum of 20,000,000 or the entire completion of the canal.

Fourth. Until the entire completion of the canal, M. Gautron, in his official capacity, shall have the right to appoint a commission of control composed of three members taken, as far as possible, from among the engineers of the department of bridges and roads and the inspectors of finances, to inspect the progress of the works, the condition and maintenance of the plant and buildings, as well as the accounts relating to these different objects.

The expense of this commission shall be borne by the new company.

ART. 6. The capital of the company is fixed at 65,000,000 francs, divided into 650,000 shares of 100 francs each.

Of these 650,000 shares, 50,000 full paid are set apart for the Government of the United States of Colombia, in accordance with the extension law of December 27, 1890, as provided in the preceding article.

As for the balance of the 600,000 shares, they are to be issued for cash subscriptions.

Capital may be increased once or several times by vote of the regular stockholders' meeting, and upon the proposition of the council of administration, by the issue of new shares.

ART. 7. The 50,000 shares set apart for the Government of the United States of Colombia, though full paid, shall be entitled to interest or dividends only on the same terms as the shares issued on subscription.

These 50,000 shares shall remain attached to their respective stubs and shall be negotiable under the conditions provided by article 2 of the French law of August 1, 1893, and by the concession laws.

ART. 8. A preference is reserved to the stockholders and bondholders of the *Compagnie Universelle du Canal Interocéanique* in liquidation, in subscribing for stock of the present company, to the extent of one-half the present capital and the total amount of all future issues.

ART. 9. The amount of each share is payable in cash into the company's treasury or to the representatives who shall be appointed for subscriptions by the new company.

It shall be payable as follows: 25 francs immediately on subscription; 25 francs on October 15, 1894; and the balance as calls shall be made by the council of administration.

Payments shall become due, in accordance with calls made by the council, upon notice published one month in advance in one of the Paris newspapers designated for the publication of legal notices.

Any shareholder may, however, pay up his shares in advance and at any time.

ART. 10. The first payment is represented by a receipt in the name of the subscriber, which, within two months from the organization of the company, shall be exchanged for a provisional certificate, also in his name.

All further payments, except the last, shall be indorsed upon this provisional certificate.

Upon the last payment being made a permanent certificate shall be issued to the shareholder, which shall be either to bearer or in his name, at his option.

ART. 11. The council of administration shall fix the form and style of the certificates of stock.

Provisional and temporary certificates shall be taken from a book with stubs; they shall be numbered in order and stamped with the seal of the company; they shall be signed by two administrators, or by one administrator and a person appointed by the council of administration.

ART. 12. All payments in arrear upon calls shall bear interest at the rate of 6 per cent per annum from the day when they shall be payable, for the benefit of the company.

In default of payment within the month wherein the same shall become payable the council of administration may, at its option, bring action at law, or sell the certificates on which payment shall not have been made.

Such sale may take place fifteen days after notice published in the "Journal Officiel" or one of the other papers in the department of the Seine designated for the publication of legal notices. It shall take place at the risk of the person in default through an *agent de change* of the Paris Bourse or through a notary, at the option of the council of administration.

The certificates for the shares sold will become void and will be replaced by new certificates in the name of the purchasers, of the same numbers.

The price of the sale will be deducted from the sums due the company from the subscriber for the share, and his assigns, who will all remain jointly and severally liable for the difference, and entitled to any surplus.

ART. 13. Shares shall stand in the names of subscribers until fully paid, in accordance with the law of August 1, 1893.

Moreover, no share can be sold, and the council of administration can not authorize its transfer, until it shall have been fully paid.

This prohibition, however, will not apply to shares belonging to future issues.

Every owner of shares to bearer shall always have the right to require the conversion of shares to bearer into shares registered in his name.

ART. 14. The shares confer a right to a proportional part in the corporate assets, in profits to be distributed as interest or dividends and in reserve funds.

Interest and dividends are paid to bearer either upon presentation of



the certificate to be stamped, for registered certificates, or upon presentation of the coupon, for certificates to bearer, at the company's office at the times which shall be fixed by the council of administration.

ART. 15. The transfer of shares to bearer is effected by simple delivery.

That of registered certificates shall take place by a declaration of transfer entered on the books of the company and signed by the transferor and transferee or their attorneys.

The expenses of transfers, changes, and conversions shall be borne by the new assignees.

ART. 16. The council of administration may authorize the keeping and deposit of certificates to bearer in the company's treasury. In that case it shall determine the form of the registered certificates of deposit, the conditions of their delivery, and the precautions with which the execution of this measure should be surrounded in the interest of the company and of the shareholders.

ART. 17. Shareholders shall not be liable upon the contracts of the company beyond the amount of the shares which they own.

In no event can any call be made for funds beyond the amount of the shares.

ART. 18. The shares are indivisible, as regards the company, which recognizes only a single owner for each share.

All owners of undivided parts of a share must be represented in dealing with the company by one and the same person.

ART. 19. The rights and obligations attached to the share follow the certificate into whatever hands it comes.

The possession of a share imports full consent to the statutes of the company as well as to all acts of a stockholders' meeting.

The heirs, creditors, or a assigns of shareholder can not, on any pretext, require a partition, or sale of the corporate property, obtain an attachment, require the sealing of the company's books, registers, papers, and securities, nor interfere with its administration.

They must, for the exercise of their rights, rely exclusively upon the corporate statements, the action of the stockholders' meetings, and the decision of the council of administration.

### TITLE III.—*Council of Administration.*

ART. 20. The company is administered by a council composed of not less than 9 nor more than 15 members chosen from among the shareholders.

ART. 21. The administrators do not, in consequence of their duties, contract any personal or joint and several obligations. They are responsible only for the performance of their duties.

ART. 22. Administrators are appointed by the stockholders' meeting for not more than six years.

If the council is composed of 9, 12, or 15 members, one-third shall be elected every two years, the outgoing members to be determined during the first period of six years by lot, and thereafter by seniority.

If the number of administrators be any other than those above specified, the stockholders' meeting shall determine the mode of choosing new members and the duration of their terms.

Outgoing administrators may always be reelected.

The second meeting of stockholders for organization shall fix the number of members of the first council and shall proceed to choose them.

This first council may, if it think fit, add to itself new members within the limits hereinbefore fixed, and must cause appointments so made to be ratified by the first regular stockholders' meeting.

ART. 23. In case of vacancy arising from resignation or death, the council of administration may fill the same until the next meeting of stockholders.

Administrators thus appointed continue in office only until the expiration of the terms of their predecessors.

ART. 24. Every administrator must be the owner of 250 shares, which are registered in his name and inalienable. They shall be stamped to indicate this inalienability and remain deposited in the company's treasury during the whole term of office of the owner.

These shares constitute a guaranty for all acts of management.

ART. 25. The council of administration shall appoint each year from among its members a president and, if there be occasion, one or more vice-presidents.

The president and vice-president may always be reelected. In case of the absence of the president and of the vice-president or vice-presidents, the council may appoint, at each session, one of its members to fulfill the duties of the office.

ART. 26. The council of administration shall meet at least once a month. It shall meet also at the call of the president as often as the interests of the company require.

Questions shall be decided by a majority of the members present.

In case of equal division the vote of the president shall preponderate.

Five administrators at least must be present to form a quorum.

When only five or six administrators are present all action, to be valid, must be taken by a majority of four votes.

No member of the council can vote by proxy.

ART. 27. The proceedings of the council of administration shall be recorded by minutes signed by the president and one of the members present at the meeting.

Copies or extracts from these minutes must, to be produced in evidence elsewhere, be certified by the president or by two administrators.

ART. 28. The council of administration is vested with the broadest powers for the management and administration of the affairs of the company, for the selection and exploitation of the public lands granted by paragraphs 7 and 8 of article 1, and by article 4 of the concession law.

The council of administration may ask any new concessions, consent

to all agreements with third parties for the purchase of enterprises or of concessions connected with any of the objects of the company.

It shall appoint and dismiss employees, determine their functions and powers, fix their salaries and pay.

It shall order and regulate expenditures.

It shall sign correspondence as well as all notes, indorsements, drafts, cheques, transfers, and conversions of assets and securities belonging to the company, and it shall contract and consent to all advances.

It shall take all financial measures necessary to the progress of the company, and make all loans other than those which must be authorized by the stockholders' meeting.

It shall lay before the stockholders' meeting all propositions concerning loans on mortgage and the issue of obligations.

It shall administer the rights in the Panama Railroad Company contributed to the company under the terms of article 5.

It shall arrange the order of business for stockholders' meetings and the accounts which are to be submitted to them. It shall make a report to each stockholders' meeting upon the accounts and the condition of the corporate affairs.

It shall fix provisionally the dividend and determine, if occasion arises, the installment to be paid on July 1 on the receipts and disbursements closed by the inventory June 30 preceding.

It shall decide upon the following subjects, to wit: 1, calls for money upon the shares; 2, temporary investment of funds in hand; 3, studies and projects, plans and estimates for the execution of the works; 4, agreements and bargains for works of various characters, bargains with penalty, and contracts not concerning the works; 5, hiring, selling, letting, and exchanging real and personal property, purchasing and hiring vessels or machines necessary for the execution of the works and the exploitation of the enterprise; 6, annual budgets; 7, fixing and modifying dues of every nature to be collected by virtue of the concession, conditions and manner of collecting tolls; 8, disposition of reserve funds; 9, regulation of deposit of stock and obligations of the company.

It shall sue for the collection of dues, the recovery of all debts, give all acquittances and discharges, consents to all replevies of mortgaged property, distresses, attachments, and other impediments, with all releases of preference, mortgage, and suit for cancellation, all before or after payment. It may create all preferences.

It shall authorize all judicial actions, whether as plaintiff or as defendant, treat, adjust, and compromise the said actions, as well as all affairs of the company.

In general it shall do, in the corporate interest, all acts which it thinks necessary and useful, the powers above recited being purely declaratory and not in limitation of the rights of the council of administration.

ART. 29. The council of administration may, for the general administration of the company, delegate all or a part of its power either to one or more of its members, with the title of administrator-delegate or to one or more managers or submanagers taken from outside the council.

It may, moreover, delegate either to one or more administrators, or to one of the employees of the company, or to one or more third persons, all or a part of its powers by special authorization and for one or more definite affairs or objects.

ART. 30. The administrators shall be compensated, over and above the share of profits fixed in article 52, by tokens of attendance, the amount of which shall be determined by the stockholders' meeting and which it shall be the duty of the council of administration to distribute to its members.

*TITLE IV.—Technical Commission.*

ART. 31. The council of administration is authorized to associate with itself a technical commission chosen from among persons competent in matters of public works, and especially from the retired inspectors-general of the departments of bridges and roads and finance.

This commission, upon communications made to it by the council of administration, shall give its opinion on questions relative to the execution of the works.

The number of members of the technical commission, as well as their remuneration, shall be fixed by the council of administration.

*TITLE V.—Commissaires.*

ART. 32. The stockholders' meeting shall appoint one or more commissaires, members or not, invested with the functions committed to them by law.

If any of the commissaires can not act, the one or more who remain shall act without them.

A compensation is allowed them, to be fixed by the stockholders' meeting.

*TITLE VI.—Stockholders' Meeting.*

ART. 33. A regularly constituted stockholders' meeting shall represent all the stockholders.

ART. 34. The stockholders' meeting shall be composed of all holders of at least 10 shares.

All holders of less than 10 shares may unite to form the necessary number and cause themselves to be represented by one of their number as provided by the law of August 1, 1893.

The meeting shall be regularly constituted when the shareholders who compose it represent a quarter of the capital of the company.

ART. 35. When, upon first assembling, the stockholders present do not comply with the conditions above specified, in order to make the proceedings of the meeting valid it may be adjourned for not less than twenty days.

A second call shall be made in the form prescribed by article 37 hereof.

The deliberations of this second meeting can only relate to the order of business provided for the first meeting. Its acts shall be valid,

whatever may be the amount of capital represented by the stockholders.

ART. 36. A stockholders' meeting shall be held every year at a day and place fixed by the council of administration before December 31.

Extraordinary meetings also shall be held whenever the council of administration may consider it useful.

ART. 37. Ordinary and extraordinary meetings may be called by means of a notice inserted at least twenty days previously and in one of the Paris papers designated for the publication of legal notices.

ART. 38. Shareholders, in order to have the right to take part in or to have themselves represented at stockholders' meetings, must qualify, at the domicile of the company, at least five days before the meeting, by the deposit of their certificates in the company's treasury or in that of one of the establishments designated for this purpose by the council of administration.

Deposits made under these conditions give a right to the issue of cards of admission in the name of the depositor.

Registered holders of registered shares or of certificates of deposit have also the right to be represented at meetings by proxies furnished with regular powers, the form of which shall be determined by the council of administration.

Holders of powers must deposit their proxies at the domicile of the company within the time fixed by the council of administration for each meeting.

No one can represent a shareholder at the meeting unless he is himself a member of the meeting.

Married women, however, may be represented by their husbands if he has the management of their rights and shares, and in like manner minors or incompetents may be represented by their guardian.

Usufructuaries and naked owners must be represented by one of them<sup>4</sup> furnished with a power from the other, or by a common proxy who is a member of the meeting.

Companies which are stockholders, as well as the Government of Colombia, may each be represented by a delegate who is not himself a shareholder.

ART. 39. The stockholders' meeting shall be presided over by the president or one of the vice-presidents, and, in default of these, by an administrator appointed by the council.

The two largest shareholders present at the opening of the meeting, who accept, shall be appointed tellers.

The officers of the meeting shall appoint the secretary.

ART. 40. Action by the stockholders' meeting shall be determined by a majority of votes of the members present or regularly represented.

In case of equal division the vote of the president shall preponderate.

ART. 41. Ten shares shall give the right to one vote. The same shareholder can not cast in all more than 200 votes, whether as shareholder or as proxy.

ART. 42. A secret vote may be required by 10 members representing together at least 200 votes.

ART. 43. The action of the stockholders' meeting is recorded in minutes signed by the president, the tellers, and the secretary.

Copies of extracts from these minutes to be used in proceedings at law or otherwise must be certified by the president or by two administrators.

ART. 44. At each stockholders' meeting a list shall be kept of members present. It shall contain the names and residences of the shareholders and the number of shares held by each. This list shall be certified by the officers of the meeting and deposited with the company's records.

ART. 45. The order of business for the stockholders' meeting shall be fixed by the council of administration.

No other questions than those contained in this order of business can be brought before the meeting.

ART. 46. The stockholders' meeting shall hear the report of the council of administration on the corporate affairs.

It shall also hear the report of the commissioner or commissioners upon the condition of the company, on the balance sheet, and on the accounts presented by the council of administration.

It shall discuss and, if need be, approve the accounts.

It shall authorize, on proposal of the council, the creation of special supplemental reserve and sinking funds which may be found useful.

It shall fix the dividend to be paid.

It shall elect administrators in place of those retiring and the commissioners.

It shall vote all loans by means of the issue of obligations or by mortgage.

It shall audit the first accounts after the execution of the works.

It shall pass upon the propositions of the council of administration.

It shall vote upon the increases of capital proposed by the council of administration.

It shall consider and finally decide upon all the interests of the company, and confer upon the council of administration all the supplementary powers which shall appear useful.

It shall have extraordinary power of decision upon the course to be taken in accordance with article 75 hereof.

ART. 47. The action of the stockholders' meeting, taken in conformity with the statutes, shall bind all shareholders, even although absent or dissenting.

*TITLE VII.—Statements of Condition; Inventories.*

ART. 48. The corporate year shall begin July 1 and end June 30.

The first period shall comprise the time between the formal organization of the company and June 30, 1895.

ART. 49. The council of administration shall prepare every six months a summary statement of the condition of the company as to assets and liabilities.

This statement shall be submitted to the commissioner or commissioners.

ART. 50. There also shall be made up at the end of each corporate year an inventory showing the real and personal property of the company and all indebtedness due to or by it.

This inventory shall be presented to the stockholders' meeting.

TITLE VIII.—*Annual Accounts; Sinking Funds; Interest; Reserve Funds; Dividends.*

ART. 51. The annual income from the enterprise shall be first applied to the payment of: 1. The share for which the United States of Colombia has stipulated for its own benefit, according to the terms of the concession law. 2. The expenses of maintenance and exploitation; the cost of administration, and all corporate charges in general; interest and sinking funds on loans which may have been contracted. 3. The previous deduction of one-twentieth of the net profits, after payment of all the charges hereinbefore mentioned, for the formation of a legal reserve fund. 4. Five per cent upon the corporate capital, the income of which shall be applied by the stockholders' meeting, in accordance with the propositions of the council of administration, not only to form the sinking fund to be established in accordance with article 55 hereof, but also to provide dividend on the shares not extinguished.

ART. 52. The excess of annual income after the various deductions provided in the preceding article constitutes the net income or profits of the enterprise. From these profits shall be deducted 5 per cent for the benefit of the council of administration.

The surplus shall belong: To the amount of 40 per cent to the shares issued and to the amount of 60 per cent to the Compagnie Universelle du Canal Interocéanique in liquidation.

ART. 53. The payment of interest and dividends shall be made at the company's office or at the offices of the representatives designated by the council of administration.

The payment of interest shall be made at two periods: January 1 and July 1 in each year.

Dividends shall be payable on January 1 next after the vote of the annual stockholders' meeting.

The council may, nevertheless, if it thinks fit, authorize a payment on account of dividends on the preceding 1st of July.

ART. 54. Interest and dividends remaining unclaimed at the expiration of five years from the time when payable shall become the property of the company.

ART. 55. The extinguishment of the shares shall be accomplished in ninety-nine years from the putting of the canal in operation.

Provision shall be made for this extinguishment by means of the deduction hereinbefore provided for in article 51, the amount of which shall be fixed by the stockholders' meeting, on recommendation of the council of administration.

The shares to be paid off shall be designated by drawing lots, which

shall be publicly done at the times and in the manner fixed by the council of administration.

ART. 56. The numbers of the shares drawn for payment shall be posted in the company's principal office.

ART. 57. Shares drawn for payment shall be paid at the places designated for the payment of dividends and interest.

Holders of extinguished shares have the same rights as holders of shares not extinguished, except as to the dividend which may be paid in accordance with article 51 hereof.

ART. 58. The share of 60 per cent set apart for the *Compagnie Universelle du Canal Interocéanique* in liquidation, may, if the liquidator so requests, be represented by certificates, to such number as he shall fix, leaving it to him to make a proper distribution thereof among the parties in interest.

This right to a share in the profits shall not give to any of those who enjoy it any right to take part in any way in the acts or administration of the company.

In all cases the provisions of articles 18 and 19 hereof, concerning shares, are equally applicable to the certificates of interest.

All expenses and formalities connected with these certificates must be borne by the holders.

Before distributing these certificates the liquidator must make arrangements for their being represented in dealings with the new company; these arrangements must be satisfactory to the council of administration of the present company.

ART. 59. The reserve fund is composed of the accumulation of the sums deducted from the annual profits, in accordance with article 51 hereof.

When this reserve fund reaches one-tenth of the capital of the company, its creation may be suspended. It must be resumed when the amount of the reserve has sunk below one-tenth of the capital of the company.

*TITLE IX.—Modification of the By-laws; Dissolution.*

ART. 60. If experience shall show the desirability of making modifications in or additions to the present statutes, the stockholders' meeting shall proceed to make them in accordance with articles 61 and 62 hereof.

It may especially determine upon a reduction of the capital of the company, a reduction in the duration, the prolongation or the earlier dissolution of the company, its consolidation with other companies.

It may even introduce modifications as to the object of the company without, however, changing its essential character.

ART. 61. Meetings which are to consider the different subjects mentioned in the preceding article will not be regularly constituted nor will their action be valid unless they are composed of a number of shareholders representing at least one-half of the capital of the company; but in such case the council of administration shall have the right, in its calls, to reduce, as far as it shall think desirable, the number of shares



which must be held in order to take part in the meeting; and in such case the holder of the minimum number of shares necessary to take part in the meeting shall have 1 vote, the holder of 10 shares shall have 2 votes, the number of votes increasing at the rate of 2 votes for 10 shares; provided, that the total number of votes of any member shall not exceed 200.

Moreover all owners of a number of shares less than that fixed for admission to the meeting may unite to form the requisite number of shares and may cause themselves to be represented by one of their number in accordance with the law of August 1, 1893.

ART. 62. It is here explained that it is in order to conform to the French law now in force that the present statutes require the representation of one-half the capital of the company at the stockholders' meetings called to consider the subjects specified in article 61 hereof, and a representation of one-quarter of the capital in the other meetings; but it is expressly understood that the company may take the benefit of any new laws which may decrease the amount of capital necessarily represented in stockholders' meetings, and that new legislative provisions concerning this question will become applicable to the company hereby created upon a resolution to that effect of a meeting of stockholders called in accordance with the rules laid down in articles 34 and 35 hereof.

ART. 63. In case of dissolution of the company the meeting of stockholders on recommendation of the council of administration shall determine the method to be adopted either for the liquidation or reorganization of the company as a new company; it may appoint one or more liquidators, and may confer upon them the broadest powers.

ART. 64. During liquidation the powers of the meetings of stockholders shall continue as during the existence of the company.

It shall have, especially, the right to approve the accounts of the liquidation and to give acquittance therefor.

The appointment of liquidators shall terminate the powers of the administrators and of all mandatories.

#### TITLE X.—*Conferring of Jurisdiction; Suits.*

ART. 65. In accordance with article 20 of the concession law of May 18, 1878, differences which may arise between the Government of the United States of Colombia and the company shall be submitted to the Federal supreme court (Colombia).

But for all other litigations the company shall have its domicile at Paris.

ART. 66. The company shall be considered commercial in its essence as in its form, and shall, accordingly, be within the jurisdiction of the tribunal of commerce of the Seine.

ART. 67. Suits concerning the general and collective interests of the company can not be brought either against the council of administration or against one of its members, except in the names of shareholders representing one-twentieth of the capital of the company. Actions concerning the rights of members can not be brought by a shareholder, or

group of shareholders, representing less than a twentieth of the company's capital.

And no action at law, brought by one or more shareholders against the company, its council of administration, or one of its members can be brought into court until after having been submitted to the examination of a meeting of shareholders, whose opinion shall be submitted to the magistrates at the same time with the complaint itself.

ART. 68. Every shareholder in case of litigation must make election of a domicile at Paris, and all notices and summonses to him may be lawfully served at the domicile by him elected, without regard to the distance of the real domicile.

In default of election of a domicile, he shall be deemed to have elected, for notices judicial and extrajudicial, the office of the attorney of the Republic at the civil tribunal of first instance of the Seine.

The domicile elected, actually or impliedly, as has just been stated, shall carry with it the conferring of jurisdiction on the competent tribunals of the Seine.

ART. 69. In all litigations which may arise between the company and third persons, notice of all judicial or extrajudicial documents must necessarily be given by service of a copy personally upon the president of the council of administration at the principal office of the company.

#### TITLE XI.—*Temporary Provisions.*

ART. 70. The subscription of the entire capital of the company, and the payment of at least one-fourth the capital in cash, shall be evidenced by a declaration of the founder acknowledged before a notary.

To this declaration shall be annexed a list of the subscribers and the state of the payments made.

ART. 71. This declaration, with vouchers, shall be submitted to the first stockholders' meeting, which shall verify its accuracy.

The same meeting shall cause the value of the contributions hereinbefore mentioned, and the consideration for the advantages agreed to be given, to be appraised.

ART. 72. A second meeting shall be called to approve, if proper, the contribution and advantages in question.

The same meeting shall elect the administrators and the commissioners created by article 32.

The minutes of the meeting shall show the acceptance of the administrators and of the commissioners.

The company shall be organized upon their acceptance.

ART. 73. Sockholders' meetings called for the organization of the company shall be composed of all the shareholders, who have each a vote, provided that the holders of several shares shall have one vote for every ten shares; but no person shall have more than ten votes.

The meetings for organization must be composed of a number of shareholders representing half the capital of the company. The capital, one-half of which must be represented for verification of the contribution, shall be composed only of the payments not subject to verification.

If the meeting does not include a number of shareholders representing half the capital, it can act only provisionally; in such case a new meeting shall be called.

Two notices published eight days apart, at least one month in advance, in one of the papers in which legal notices are published in Paris, shall give notice to the shareholders of the provisional action taken by the first meeting, and this action shall become final if approved by a new meeting composed of a number of shareholders representing at least one-fifth of the capital of the company.

ART. 74. All general provisions of Title VI, relative to stockholders' meetings, not inconsistent with those contained in this title, shall be applicable to meetings of stockholders for organization, except that meetings for organization may be called by a notice inserted in a newspaper in which legal notices are published in Paris, as follows: For the first meeting, two days beforehand, and for the second meeting at least ten days beforehand.

ART. 75. When the amounts expended, as well for the work done upon the canal as for the discharge of the burdens resulting from the contribution of M. Gautron, shall reach about one-half of the cash capital of the company at the minimum, a special technical commission, theretofore appointed at a proper time shall pronounce upon the results obtained from the work already done and upon the conclusions to be drawn therefrom as to the remainder of the enterprise.

The commission shall be composed of 2 members, appointed by the council of administration of the present company, and of 2 persons appointed by the liquidation of the old *Compagnie Universelle du Canal Interocéanique*. These 4 members shall appoint a fifth, who shall be president of the commission, and if they can not agree, this president shall be appointed by the president of the tribunal of commerce of the department of the Seine.

The council of administration shall be required to make public the opinion of this commission, and to call a special meeting of stockholders in the manner provided in articles 61 and 62 hereof.

This meeting shall consider the ways and means tending to insure the completion of the work and the stipulations contained in article 5, section 4, No. 3 hereof.

#### TITLE XII.—*Publications.*

ART. 76. Within the month of the organization of the company the administrators shall file in the registry of the tribunal of commerce of the Seine and of the justice of the peace of the ninth *arrondissement* of Paris, 1, a copy of the articles of association; 2, a copy of the document showing the subscription of the capital and the payment of one-fourth; 3, a copy, or a certified copy, of the action of the stockholders' meeting, in accordance with articles 71 and 72 hereof; 4, a copy, or a certified copy, of the list of the names of the subscribers.

ART. 77. Within the same time an extract from the documents and

proceedings specified in the preceding article shall be inserted in one of the newspapers publishing legal notices in Paris, in pursuance of law.

ART. 78. Full powers are granted the holders of the documents for the filing and publication in question.

ART. 79. Finally, it is noted that all the provisions contained in the two last preceding titles, relative to the organization and publications of the present company, have been dictated only by the requirements of the French law as to joint stock companies now in force.

Express reservation is made of the benefit of all new provisions which the legislature may introduce into the law.

---

EXHIBIT J.

MINUTES OF THE ORGANIZATION MEETINGS OF THE NEW  
PANAMA CANAL COMPANY.

On the 22nd of October, one thousand eight hundred and ninety-four, Before Me. Felix Edouard Lefebvre and Me. Louis Antoine Maurice Champetier de Ribes, both notaries at Paris, undersigned, has appeared M. François Gustave Ramet, former President of the Tribunal of Commerce, of Rennes, residing at Paris, Rue Demours, No. 83, acting in the capacity of founder of the Compagnie Nouvelle du Canal de Panama, with a capital of 65,000,000 francs, whose principal office has been provisionally fixed at Rue de la Victorie, No. 63 bis, and whose by-laws have been settled in accordance with a document executed before Me. Lefebvre and Maurice Champetier de Ribes, notaries undersigned, the 26th day of June, 1894, and followed by a declaration of subscription and payment before the same notaries, the 29th of September last, the particulars of which appear above, who, by these presents deposits with Lefebvre, notary undersigned, and has requested him to enter upon his minutes, under date of this day, in order that all extracts and copies which may be needed may be issued, to-wit:

1. The original, certified by the officers, of the minutes under date of the fourth of October instant, of the first organization meeting of the shareholders of the anonymous company, Compagnie Nouvelle du Canal de Panama

It appears from these minutes:

That the meeting of shareholders after having heard read the by-laws and the declaration of subscription and payment, has declared that it accepts the declaration of subscription and payment, as made in good faith, and has declared that the sum of the payments made by the shareholders had been made in cash, and deposited in *caisse des consignations*;

And that, after having considered the matter, the meeting had appointed as commissaires:

M. Pierre Edouard Fougeu, former notary, and Vice President of the

Committee of Bondholders, of Orleans, residing at Orleans, Boulevard Alexandre Martin, No. 65,

M. Charles Florian Goudchaux, Chief of Division in the Department of Posts and Telegraphs, retired, residing at Paris, Rue Lafayette, No. 119,

And M. Jean Baptiste Georges Focké, manager of the newspaper "L'Avenir Industriel et Commercial," residing at Paris, rue Caumartin No. 26.

Who were directed to appraise the value of the contributions made by M. Gautron, liquidator of the Compagnie Universelle du Canal Interoceanique de Panama, and the benefits provided, as well in consideration of these contributions as for the benefit of the administrators, and generally to fulfill the duties fixed by law and the by-laws;

To these minutes are annexed:

A copy of the newspaper "Les Petites Affiches," issue of Sunday, September 30th last, containing the notice of calling of the first organization meeting of stockholders, said copy recorded and certified;

The attendance sheet, signed by each member upon his arrival, and certified by the officers, with one hundred and eleven proxies, given by different shareholders, and two copies made by Messrs. Lefebvre and Portefin, notaries at Paris, of powers of attorney given by the Credit Lyonnais to M. Rabeau and by the société Générale to M. de Fre-daignes;

II. And the original, certified by the officers, of the minutes, under date of the 20th of October instant, of the second organization meeting of shareholders of the said Company.

It appears from these minutes:

That the shareholders' meeting approved, by the unanimous vote of the members present, except only M. Gautron and the Commissioners, who did not vote, the report printed and deposited at the main office on the 13th inst. by Messrs. Fougeu, Goudchaux and Focké, Commissioners appointed by the first organization meeting of shareholders of the fourth of October, instant, adopts the conclusion of this report, and accordingly says that it approves the provisions made and benefits provided in consideration of the contribution of M. Gautron, and for the benefit of the administrators by the by-laws;

That said meeting decided, by unanimous vote of the members present, that the attendance pay of the council of administration should be fixed at the sum of three thousand francs for each acting administrator per annum, leaving to the council to divide the total between its members in conformity with the business to each of them; and at two thousand francs for each period, the compensation to be allotted to each of the commissaires of accounts;

That the meeting, after due consideration, decided unanimously, with the exception of two persons, one having ten votes, and the other eighteen,

That the council of administration should be fixed for the present at ten, and appoints to fill these offices for the first period of six years; —

M. Theophile Auguste Baillet, merchant, former Judge of Tribunal of Commerce of Orleans, residing at Orleans, rue Dauphine No. 13;

M. Jean Bonnardel, administrator of the Compagnie des chemins de fer de l'Ouest, residing at Lyons, quai d'Occident, No. 3;

M. Georges Brolemann, administrator of the Crédit Lyonnais, residing at Paris, Boulevard Malesherbes, No. 52;

M. Calixte Carraby, administrator of the Comptoir National d'Es-compte, residing at Paris, Rue Pigalle, No. 14;

M. Gabriel François Chanove, administrator delegate of the Société des Forges et Aciéries de Huta Bankowa, residing at Paris, rue de Prony, No. 95;

M. Gabriel Jules Jonquiere, former Inspector of public lands, residing at Paris, rue Spontini No. 1;

M. Augustin Aime Le Begue, administrator of the Société Générale, residing at Paris, Boulevard Malesherbes No. 81;

M. François Gustave Ramet, former President of the Tribunal of Commerce of Rennes, residing at Paris, rue Demours No. 83;

M. de Saint Quentin Marcel Pierre Acheman, administrator of the Crédit Industriel et Commercial, residing at Paris, Boulevard des Batignolles, No. 82;

M. Lucien Souchon, administrator of the Société des Houillères de Saint Etienne, residing at Lyon Place de la Charité;

And that in case M. Saugnier, previously proposed, should not change his decision, it invited the council to consider at the next shareholders' meeting, the desire, expressed by it, to see added to the list of the council an authorized representative of the bondholders of the old company;

That said meeting recognized the acceptance of said duties of directors;

That said meeting, after due consideration, appointed unanimously, with the exception of one shareholder, having ten votes, commissaires to report to the shareholders' meeting on the accounts of the first corporate fiscal period, and on the situation of the company:

M. Auguste Louis Joseph Barbier, Auditor of the Tribunal of Commerce of the Seine, residing at Paris, Avenue de la République, No. 12;

M. Auguste Etienne Lemoine, Associate Agent de change, residing at Paris, rue de la Pompe, No. 10;

And M. Pierre Edouard Fougeu, former notary, and Vice President of the Committee of Bondholders of Orleans, residing at Orleans, Boulevard Alexandre Martin, No. 65;

That it recognized the acceptance of said duties by the commissioners.

And that the company was declared formally organized, in conformity with the law and the by-laws.

To these minutes are annexed;

A copy of the newspaper "Les Petites Affiches," issue of Tuesday, the 9th of October last, containing the notice of the calling of the second organization meeting of stockholders, said copy recorded and certified;

The attendance sheet, signed by each member on his arrival, and certified by the officers, with two hundred and sixteen stamped memo-

rande, signed by the proxies of the absent shareholders, and three thousand and ninety-one powers of attorney in support of said memorandum;

A copy of the report of the commissaires, certified by them as true;

A power of attorney, given by the administrators and the commissioners to M. Ramet, to accept the duties of administrators and of commissaires.

Which minutes have been hereto annexed, after having been certified as true by the party appearing, and that mention above of this annexing was made and signed by the undersigned notaries.

Reference to these presents are allowed wherever necessary.

And for the making of the filing and publication prescribed by law, full power is given to the holder of a copy of this document.

Done and passed at Paris, Rue Tronchet, No. 34, in the office of M. Lefebvre, one of the notaries undersigned.

The day, month and year above mentioned.

And the same having been read, the party appearing has signed with the notaries.

The signatures follow.

On the margin is written:

Recorded at Paris, Fourth Bureau, the 29th of October, one thousand eight hundred and ninety-four, Fol. 82, case 7, 3 francs seventy-five centimes, decimes included.

(Signed)

COPIN.

#### APPENDIX.

##### NEW PANAMA CANAL COMPANY.

Anonymous company with capital of 65,000,000 francs.

Principal office at Paris, rue de la Victoire No. 63 bis.

*First meeting of shareholders, for the organization of the company.*

In the year one thousand eight hundred and ninety-four, Thursday the fourth of October, at half-past ten o'clock in the forenoon,

The shareholders of the Compagnie Nouvelle du Canal de Panama, an anonymous company, with a capital of sixty-five million francs, whose principal office is at Paris, rue de la Victoire, No. 63 bis,

The said company, formed by M. François Gustave Ramet, former President of the Tribunal of Commerce at Rennes, residing at Paris, rue Demours, No. 83, according to a document executed before Messrs. Lefebvre and Maurice Champetier, notaries at Paris, the twenty-sixth of June, one thousand eight hundred and ninety-four,

Met in first organization meeting of shareholders at Paris, rue de Lanery, No. 10, at the building of the Union Nationale des Chambres Syndicales, on the call, addressed to them by the insertion in the general

paper for advertisements, issue of Sunday, the thirtieth of September, one thousand eight hundred and ninety-four, called the "*Petites Affiches*."

This meeting is for this purpose:

1st. Of verifying the correctness of the declaration of subscription and payment made in accordance with document executed before Messrs. Lefebvre and Maurice Champetier de Ribes, notaries at Paris, the twenty-ninth of September, one thousand eight hundred and ninety-four,

2d. And of appointing one or more commissaires for the purpose of appraising the value of the contributions made by M. Gautron, as liquidator of the *Compagnie Universelle du Canal Interocéanique de Panama*, and the provisions made and benefits provided, in consideration of said contributions, and for the benefit of the administrators; and of making a report to the second organization meeting of shareholders.

M. Gautron is requested to fill the office of president, which he states that he accepts.

He asks to assist him as scrutators, in default of the acceptance of larger subscribers:

M. Gabriel Chanove, Civil Engineer, residing at Paris, rue de Prony No. 95,

And M. François Gustave Ramet, founder of the company,

Both subscribers for two hundred and fifty shares.

In consequence Messrs. Chanove and Ramet are appointed scrutators, and accept these offices.

The President and scrutators appoint to the office of secretary M. Théophile Auguste Baillet, merchant, former Judge of the Tribunal of Commerce of Orleans, residing at Orleans, rue Dauphine No. 13, who accepts and takes his place at the desk in this capacity.

The officers thus appointed certified the attendance sheet, signed by each member on his arrival.

This sheet shows the presence, personally or by proxy, of shareholders representing three hundred and seventy-two thousand, nine hundred and sixty shares, viz, more than one-half the corporate capital, and giving a right to one thousand and thirty-two votes.

Consequently, the president announces the regularity of the meeting, and declares it open.

The president lays before the meeting:

1st. A copy of the paper for judicial and legal notices, "*Les Petites Affiches*," issue of twenty-ninth of September one thousand eight hundred and ninety-four, bearing the number two hundred and seventy-three, said copy recorded, containing the notice of the calling together of the subscribers to the shares of the *Compagnie Nouvelle du Canal de Panama*, in first organization meeting of shareholders.

The president requests M. Lefebvre, Notary of Paris, present at the meeting, to read:

1st: The by-laws of the company, according to document executed before him and M. Maurice Champetier de Ribes, the twenty-sixth of June, one thousand eight hundred and ninety-four;



2d. And the declaration of subscription and payment of the corporate capital in cash, executed before Messrs. Lefebvre and Maurice Champetier de Ribes, notaries at Paris, twenty-ninth September, one thousand eight hundred and ninety-four.

These two documents are read to the meeting.

This reading being finished, the president states that the meeting is called upon to consider and vote on the following resolutions, which he reads:

FIRST RESOLUTION.

The meeting, after having read the by-laws, prepared by Messrs. Lefebvre and Maurice Champetier de Ribes, notaries of Paris, the twenty-sixth day of June, one thousand eight hundred and ninety-four, and the declaration of subscription and payment, executed before the same notaries the twenty-ninth of September, one thousand eight hundred and ninety-four, declares that it recognizes the correctness of this declaration of subscription and payment, and that it finds that the amount of payments made by the shareholders has been paid in cash, and deposited with the *caisse des dépôts et consignations*.

This resolution is passed unanimously by show of hands.

Thereupon, the president requests the assembly to appoint three commissaires, whose duty will be to appraise the value of the contributions made to the company by the liquidation of the *Compagnie Universelle du Canal Interocéanique de Panama*, as well as the provisions made for the benefit of the liquidation, in consideration of the said contributions, as well as the benefits provided by the by-laws, for the benefit of the administrators, and to make to the second organization meeting of shareholders, the report prescribed by law and the by-laws.

And he explains that these contributions and benefits result from Articles five, six, eight and fifty-one and fifty-two of the by-laws, previously read.

The president observes, furthermore, that he cannot personally take part in the voting.

After an exchange of explanations, and the proposal of various names successively put to vote, the president puts to vote the following resolution, which he reads:

SECOND RESOLUTION.

The meeting, after due deliberation, appoints as commissaires:

M. Pierre Edouard Fougeu, former notary, and Vice President of the Committee of Bondholders, of Orleans, residing at Orleans, Boulevard Alexandre Martin, No. 65;

M. Charles Florian Goudchaux, Chief of Division in the Department of Posts and Telegraphs, retired, residing at Paris, Rue Lafayette, No. 119;

And M. Jean Baptiste Georges Focké, manager of the newspaper "L'Avenir Industriel et Commercial," residing at Paris, Rue Caumartin No. 26;

Who are directed to appraise the value of the contributions made by M. Gautron, liquidator of the Compagnie Universelle du Canal Inter-océanique de Panama, and the benefits provided, as well in consideration of these contributions as for the benefit of the administrators, and generally to fulfill the duties fixed by the law and the by-laws.

This resolution, put to vote, is passed by show of hands.

Messrs. Fongeu, Goudchaux and Focké, being present, state that they accept the said offices.

The president requests the commissioners to prepare their report in the shortest possible time, and reminds them that it must be kept for the inspection of the shareholders at the company's office, five days before the second meeting of shareholders.

After which the president declares the meeting adjourned.

There have been annexed to the present minutes:

A copy of the newspaper "Les Petites Affiches," issue of Sunday, the thirtieth of September last, containing notice of the calling of the present meeting, said copy recorded and certified;

The attendance sheet, signed by each member on his arrival, certified by the officers, with one hundred and eleven proxies, given by different shareholders, and two copies, delivered by Messrs. Lefebvre and Portefin, notaries at Paris, of powers of attorney, given by the Crédit Lyonnais to M. Rabreau, and by the Société Générale to M. de Fredaignes.

Of all the matters set forth above, these present minutes have been prepared, which have been signed by the officers of the company.

The President (signed) GAUTRON,

A scrutator (signed) CHANOVE,

A scrutator (signed) RAMET,

The Secretary (signed) AUG. BAILLET.

Thereafter is written,

Recorded at Paris,

Fourth Bureau, twenty-ninth October one thousand eight hundred and ninety-four, folio eighty-three, case three, received three francs seventy-five centimes, decimes included.

(Signed)

COPIN.

NEW PANAMA CANAL COMPANY.

Anonymous company with capital of 65,000,000 francs.

Principal office at Paris, rue de la Victoire No. 63 bis.

*Second meeting of shareholders, for the organization of the company.*

In the year one thousand eight hundred and ninety-four, Saturday, the twentieth of October at half-past two o'clock, in the afternoon,

The shareholders of the Compagnie Nouvelle du Canal de Panama, an anonymous company, with a capital of sixty-five million francs, whose principal office is at Paris, rue de la Victoire, No. 63 bis,

The said company, formed by M. François Gustave Ramet, former president of the Tribunal of Commerce at Rennes, residing at Paris, rue Demours, No. 83, in accordance with document executed before Messrs. Lefebvre and Maurice Champetier, notaries at Paris, the twenty-sixth of June, one thousand eight hundred and ninety-four,

Met in second organization meeting of shareholders at Paris, in the room of the Société d'Horticulture de France, rue Grenelle, No. 84, on a call which was addressed to them, by insertion in the general paper for advertisements, issue of Tuesday, ninth of October, one thousand eight hundred and ninety-four, called "Petites Affiches."

The purpose of this meeting is:

To hear read the report of the commissioners appointed by the first organization meeting of shareholders as to the value of the contributions made to the company by M. Gautron, in his capacity of liquidator of the Compagnie Universelle du Canal Interocéanique de Panama, and the provisions and benefits stipulated, as well in consideration of the said contributions, as for the benefit of the administrators, and to take action upon the conclusions of said report;

To appoint administrators of the Company, and to ascertain their acceptance:

To fix the amount of the attendance fee allotted to the administrators, and the remuneration awarded to the commissaires;

And to declare, if such be the case, that the company is formally organized.

M. Georges Lemarquis, mandataire of the Panama bondholders, and member of the meeting, is requested to take the office of president, which he states that he accepts.

He requests to assist him, as tellers, in default of the acceptance of larger subscribers:

M. Simon Edouard Joyant, rentier, residing at Paris, Boulevard Malesherbes No. 97,

And M. Abel Adrien Alexis Couvreur, contractor for public works, residing at Paris, rue d'Anjou No. 78,

Subscribers, the first to eight hundred and twenty-six shares, and the second to six hundred and twenty-five shares.

Accordingly, Messrs. Joyant and Couvreur are appointed tellers, and accept these offices.

The president and the tellers appoint to the office of Secretary M. Theophile Auguste Baillet, merchant, former Judge of Tribunal of Commerce of Orleans, residing at Orleans, rue Dauphine No. 13, who accepts, and takes his place at the desk in this capacity.

The officers thus constituted, certify the attendance sheet signed by each member on arrival.

This sheet shows the presence in person, or by proxy, of shareholders representing five hundred and twenty-three thousand six hundred and forty-eight shares, say more than one-half of the corporate capital, and giving a right to four thousand eight hundred and seventy-six votes.

Accordingly, the president declares the meeting regular, and states the meeting is open.

The commissioners appointed by the first meeting of shareholders, take the floor and read their report.

This report concludes by approving the provisions made in the by-laws in favor of M. Gautron, in consideration of the contributions made by him as liquidator of the *Compagnie Universelle du Canal Interocéanique de Panama*, and for the benefit of the administrators.

The president, after having furnished the assembly various additional explanations, and having ascertained that no shareholder asks the floor, puts to vote the following resolutions:

FIRST RESOLUTION.

The meeting, after having informed itself concerning the report printed and filed in the office of the company the thirteenth of October instant, by Messrs. Fougeu, Goudchaux and Focké, commissioners appointed by the first organization meeting of commissioners of October fourth instant, adopts the conclusions of its report, and consequently declares that it approves the provisions and benefits stipulated in consideration of the contribution of M. Gautron, and for the benefit of administrators, by the by-laws.

This resolution is passed unanimously by the members present, with the exception of only M. Gautron and the commissioners, who state that they do not vote.

The president next asks the meeting to fix the value of the attendance tickets to be issued to the administrators and the compensation of the commissioners.

After exchange of explanations the president puts to vote the following resolution:

SECOND RESOLUTION.

The meeting decides that the attendance fees of the council of administrators shall be fixed at the sum of three thousand francs for each acting administrator per annum, leaving to the council to distribute the total among its members, according to the employment to each of them, and at two thousand francs for each fiscal period the compensation to be allotted to each of the commissioners of accounts.

This resolution is passed unanimously by the members present.

The president next requests the meeting to appoint the administrators of the company for the first period of six years, in conformity with the by-laws, and informs the meeting that a list of eleven persons had been presented to him, which he reads to the meeting.

Mr. Saugnier, former treasurer paymaster general of the Department of the Loire, mentioned in this list, states that he declines the duties which are offered him, and refuses to be a candidate.

The president expresses a desire that Mr. Saugnier should re-consider his decision.

He then opens the debate as to the choice of administrators.

Mr. Georges Thiébaud, member of the meeting, offers several observations as to the character of the list presented, and the incompatibility which may exist between the duties of administrators of the financial companies, borne by several of the candidates proposed, and the duties of the administrators of the company.

Mr. Focké proposes to the meeting several names which he would desire to see added to the list.

The President explains to the meeting that the list was made up by agreement between the persons who compose it, and forms a homogeneous whole, which it is difficult to change without the consent of its members.

He reserves, however, to the council, the power of completing itself in conformity with the wishes of the meeting, and with the by-laws.

After further exchange of explanations, in which Mr. Georges Thiébaud takes part, the president puts to vote the following resolution.

#### THIRD RESOLUTION.

The meeting, after due consideration, in conformity with article twenty-two of the by-laws, decides that the council of administration be fixed for the present at ten, and appoints to fill these offices during the first period of six years,

Mr. Théophile Auguste Baillet, merchant, former Judge of the Tribunal of Commerce of Orleans, residing at Orleans, rue Dauphine No. 13.

Mr. Jean Bonnardel, administrator of the Compagnie des chemins de fer de l'Ouest, residing at Lyons, quai d'Occident, No. 3.

Mr. Georges Brolemann, administrator of the Crédit Lyonnais, residing at Paris, Boulevard Malesherbes, No. 52.

Mr. Calixte Carraby, administrator of the Comptoir National d'Escompte, residing at Paris Rue Pigalle, No. 14.

Mr. Gabriel François Chanove, administrator delegate of the Société des Forges et Aciéries de Huta Bankowa, residing at Paris, rue de Prony, No. 95.

Mr. Fabriel Jules Jonquiére, former Inspector of public lands, residing at Paris, rue Spontini No. 1.

Mr. Augustin Aimé Le Bégue, administrator of the Société Générale, residing at Paris, Boulevard Malesherbes No. 81.

Mr. François Gustave Ramet, former President of the Tribunal of Commerce of Rennes, residing at Paris, rue Demours No. 83.

Mr. Marcel Pierre Acheman de Saint Quentin, administrator of the Crédit Industriel et Commercial, residing at Paris, Boulevard des Batignolles, No. 82.

Mr. Lucien Souchon, administrator of the Société des Houillères de Saint Etienne, residing at Lyon, Place de la Charité.

And in case Mr. Saugnier, heretofore suggested, should not reconsider his decision, the meeting requests the Council to consider at the time of the next shareholders' meeting the desire expressed by it, of seeing added to the list of the Council an authorized representative of the security holders of the old company.

This resolution is passed, unanimously with the exception of two persons, who, upon being questioned, state that one possesses ten votes and the other eighteen.

Mr. Ramet, as well in his own name personally as in the name of the administrators elected, states that they accept the offices which are conferred upon them.

The president requests the meeting to appoint the commissioners to verify the accounts for the first fiscal period, and suggests to the meeting a list of three names, which is proposed.

He puts to vote the following resolution.

#### FOURTH RESOLUTION.

The meeting, after due consideration, appoints Mr. Auguste Louis Joseph Barbier, auditor of the Tribunal of Commerce of the Seine, residing at Paris, Avenue de la République, No. 12.

Mr. Auguste Etienne Lemoine, associate agent de change, residing at Paris, rue de la Pompe, No. 10.

And Mr. Pierre Edouard Fougeu, former notary, Vice President of the Committee of Bondholders of Orleans, residing at Orleans, Boulevard Alexandre Martin, No. 65,

Commissioners to make the report to the shareholders' meeting, on the accounts of the first corporate fiscal period, and upon the situation of the company, in conformity with the law and article thirty-two of the by-laws.

This resolution is passed unanimously, with the exception of a shareholder having ten votes.

Mr. Ramet states that he accepts in the names of Messrs. Barbier and Lemoine, the offices which have just been conferred upon them.

Mr. Fougeu, present at the meeting, states that he accepts also.

In the course of this voting, Mr. Georges Thiébaud filed with the officers a protest, as follows, which is inserted in the present minutes, at the express request of Mr. Georges Thiébaud, and subject to all reservations on the part of the officers:

Mr. Georges Thiébaud, shareholder, 33 quai Voltaire, Paris, protests in the most formal way against the method of voting which has been employed for the election of the council of administration, which was elected by count of the show of hands of the shareholders, who did not desire it. Furthermore, the list of the council, contrary to the by-laws, was not composed of nine, twelve or fifteen members, but of ten and eleven.

Furthermore, the council, instead of being elected name by name, were elected in a body, and decisions upon other matters were annexed.

(Signed)

GEORGES THIEBAUD.

The President announces, as a result of the resolutions above adopted, that the Compagnie Nouvelle du Canal de Panama, is formally organized in conformity with the law and the by-laws.

He adds a few words as to the formalities which are to be immediately

complied with to inform the Government of Colombia of the organization of the company, and announces the immediate resumption of work on the Isthmus of Panama.

#### DECLARATION FOR RECORDING.

For the collection of the dues for recording, only, it is here declared, That the sum of seven million five hundred thousand francs to be paid to the Government of Colombia, under the provisions of the concession laws, applies to the rights in real property included in the concession of the Colombian Government, especially to the lands in which the canal will be dug, to the strip of land granted on each of its sides, and to the five hundred thousand hectares of public lands granted, with the mines which they may contain.

The meeting was adjourned at six o'clock.

There have been annexed to the present minutes,

A copy of the paper "*Les Petites Affiches*," issue of Tuesday, ninth October last, containing the notice of the calling of the present meeting, said copy recorded and certified.

The attendance sheet, signed by each member on arrival, and certified by the officers, with two hundred and sixteen stamped memoranda, containing the details of the proxies given by the shareholders not present, signed by the said proxies, and three thousand and ninety-one powers in support of the said memoranda.

A copy of the report of the commissioners, certified by them as true.

A power of attorney, given by the administrators and commissioners to Mr. Ramet, to accept their offices.

#### PUBLICATIONS.

For making the filing and publication prescribed by law, full powers are given to the bearer of a copy of the documents and minutes of organization of the company.

Of all which is above set forth, the present minutes have been prepared, which have been signed by the officers, the administrators and the commissioners, or their proxies.

The President (signed) LEMARQUIER,  
A Scrutator (Signed), JOYANT,  
A Scrutator (Signed), COUVREUX,  
The Secretary (Signed), AUG. BAILLET.

Good as an acceptance of the offices of administrators, both in my name personally, and as attorney in fact.

Signed Ramet.

Good as an acceptance of the office of commissioners for Messrs. Barbier and Lemoine.

Signed Ramet.

Thereafter is written,

“Recorded, Paris Fourth Bureau, twenty-ninth October, one thousand eight hundred and ninety-four, folio thirty-three, case five, one hundred and seventy-two thousand five hundred francs, decimes included.

Signed Copin.

---

The undersigned,

Mr. Theophile Auguste Baillet, merchant, former Judge of the Tribunal of Commerce of Orleans, residing at Orleans, rue Dauphine No. 13.

Mr. Jean Bonnardel, administrator of the Compagnie des chemins de fer de l'Ouest, residing at Lyons, quai d'Occident, No. 3.

Mr. George Brolemann, administrator of the Crédit Lyonnais, residing at Paris, Boulevard Malesherbes, No. 52.

Mr. Calixte Carraby, administrator of the Comptoir National d'Es-compte, residing at Paris, Rue Pigalle, No. 14.

Mr. Gabriel François Chanove, administrator delegate of the Société des Forges et Acières de Huta Bankowa, residing at Paris, rue de Prony, No. 95.

Mr. Gabriel Jules Jonquière, former Inspector of public lands, residing at Paris, rue Spontini No. 1.

Mr. Augustin Aimé Le Begue, administrator of the Société Générale, residing at Paris, Boulevard Malesherbes, No. 81.

And Mr. Marcel Pierre Acheman de Saint Quentin, administrator of the Crédit Industriel et Commercial, residing at Paris, Boulevard des Batignolles, No. 82.

In case they should be appointed as administrators of the Compagnie Nouvelle du Canal de Panama by the second organization meeting of shareholders,

Give by these presents full power to Mr. François Gustave Ramet, former President of the Tribunal of Commerce of Rennes, residing at Paris, rue Demours, No. 83.

For the purpose of:

Accepting the said offices of administrators, or declining them, for each of them individually.

Paris, twentieth October one thousand eight hundred and ninety-four.

Good as power, (signed) BAILLET,

Good as power, (signed) BONNARDEL,

Good as power, (signed) BROLEMANN,

Good as power, (signed) CARRABY,

Good as power, (signed) CHANOVE,

Good as power, (signed) JONQUIÈRE,

Good as power, (signed) LE BEGUE,

Good as power, (signed) DE SAINT QUENTIN.

Thereafter is written:

Recorded at Paris, fourth bureau, twenty-ninth October, one thousand eight hundred and ninety-four, folio 83, case 10, received thirty francs, decimes included.

(Signed)

CHOPIN.



The undersigned, Lucien Souchon, administrator of the *Société des Houillères de Saint Etienne*, residing at Lyon, Place de la Charité.

Gives by these presents power to Mr. François Gustave Ramet, former President of the Tribunal of Commerce of Rennes, residing at Paris, rue Demours No. 83.

For the purpose of accepting, in my name, the office of administrator of the *Compagnie Nouvelle du Canal de Panama*, in case it should be conferred upon me by the second organization meeting of shareholders.

For the said purpose, to sign all minutes.

Lyon, the nineteen of October, one thousand eight hundred and ninety-four.

(Good as a power, (Signed) SOUCHON.

Thereafter is written:

Recorded at Paris, fourth Bureau, twenty-ninth of October, one thousand eight hundred and ninety-four, folio 83, case 10, received three francs, nineteen centimes, decimes included.

(Signed) CHOPIN.

The undersigned,

Mr. Auguste Louis Joseph Barbier, auditor of the Tribunal of Commerce of the Seine, residing at Paris, Avenue de la République, No. 12.

And Mr. Auguste Etienne Lemoine, associate agent de change, residing at Paris, rue de la Pompe, No. 10.

Give by these presents, power

To Mr. François Gustave Ramet, former President of the Tribunal of Commerce of Rennes, residing at Paris, rue Demours No. 83.

For the purpose of accepting for each of the undersigned the offices of auditing commissioners of the *Compagnie Nouvelle du Canal de Panama*, in case these offices should be conferred upon us by the second organization meeting of shareholders of the Company.

For the said purpose, to sign all the minutes.

Paris, the eighteenth October one thousand eight hundred and ninety-four.

Given as a power (signed) BARBIER,

Given as a power (signed) LEMOINE.

Thereafter is written,

Copied on nineteen pages and one-half, containing three interlineations, approved, and three words erased.

Recorded at Paris, fourth Bureau, twenty-ninth October one thousand eight hundred and ninety-four, folio 83, case 10. Received seven francs, fifty centimes, decimes included.

LEFEBVRE

(Signed) LEFEBVRE.

**EXHIBIT K.****JUDGMENT OF JUNE 29, 1894 (CIVIL TRIBUNAL OF THE SEINE), APPROVING CONTRIBUTION BY THE LIQUIDATOR TO THE NEW PANAMA CANAL COMPANY.**

[Taken from the minutes of the civil tribunal, lower court, for the department of the Seine, sitting in the palace of justice, Paris.]

The civil tribunal, lower court, for the department of the Seine, sitting in the palace of justice, Paris, has rendered, in open and public session of its first division, the following judgment:

Done at the sitting of the 29th day of June, 1894.

The tribunal having examined and considered the petition presented by Gautron, as liquidator of the court for the Universal Company of the Panama Interoceanic Canal, which petition is signed by de Biéville, his solicitor; and the tribunal having also examined and considered the documents produced, and the petition aforesaid being conceived as follows:

To the honorable the president and justices of the first division of the civil tribunal of the Seine, the petitioner, M. Jean Pierre Gautron, liquidator of the court, residing in Paris, No. 13 Tronchet street, represents as follows:

That he is acting in his capacity as liquidator for the Universal Company of the Panama Interoceanic Canal, whose legal residence is in Paris, No. 63 bis, rue de la Victoire; that he was named liquidator as aforesaid by a decree rendered in chambers by the civil tribunal of the Seine on the 21st day of July, 1893.

That he, through his solicitor, M. de Biéville, respectfully states that on the 4th day of February, 1889, M. Joseph Brunet was named, by recorded decree of the first division of this tribunal, liquidator for the Universal Company of the Panama Interoceanic Canal, and was given most extensive powers, notably that of granting, or making a contribution of, either the whole or a part of the assets of the company to a new company or association.

That by a recorded decree of this tribunal, rendered in chambers on the 13th day of February, 1890, M. Achille Monchicourt was named co-liquidator for the said company, with M. Joseph Brunet, and was given the same powers, to use individually or in conjunction with the latter.

That owing to the resignation of M. Brunet, M. Achille Monchicourt has been confirmed, by a chambers decree dated the 8th day of March, 1890, as sole liquidator for the said company, with the broadest powers, notably "that of giving or making a contribution, to a new company or association, of either the whole or a part of the assets of the company aforesaid; of entering into and rectifying with contractors all contracts and agreements aiming to the continuation or preserving of the work, and of prolonging and renewing all agreements, of giving all guarantees, necessary for this purpose."

Finally, that by a decree rendered in chambers on the 21st day of July, 1893, M. Jean Pierre Gautron was appointed co-liquidator with M. Achille Monchicourt, with the same and equal powers, to use individually or jointly with the said M. Monchicourt.

That owing to the decease of M. Achille Monchicourt, which occurred on the 14th day of March, 1894, M. Gautron remains sole liquidator of the Panama Interoceanic Canal Company.

That a new company is in process of formation at the present time for the purpose of resuming the work and completing the canal.

That the by-laws of this company, called the New Panama Canal Company, have been drawn up and deposited for record by M. Gustave Ramet, formerly president of the tribunal of commerce at Rennes, and have been filed also in the records and minutes of M. Lefebvre, notary, in Paris.

That your petitioner, by virtue of the powers conferred by the orders and decrees aforesaid on the liquidator for the Panama Interoceanic Canal Company, is preparing to make contribution to the new company now being constituted: First, of all rights whatsoever accruing to the old company from the laws of the Government of the United States of Colombia, dated May 18, 1878, and December 26, 1890, as well as from all decrees, acts, or facts whatever having followed upon these laws in the course of their execution, and all advantages and benefits accruing therefrom and stipulated by these laws and decrees, together with all territory and real estate having been granted and ceded to the interoceanic company now in process of liquidation, or acquired by the same, all this provided the new company fulfill the conditions prescribed and imposed by the laws and acts passed in granting or extending the concession, and provided it pay and discharge all sums and indebtedness remaining due to the Colombian Government by the old company.

Secondly. Of the work already done and accomplished, of the yards, workshops, buildings, hospitals, plant mounted and unmounted, and of the stores, etc., belonging to the liquidation as well as of all deposits.

Thirdly. Of the plans, estimates, surveys, and specifications, and of all documents whatsoever gathered and collected by the Universal Company of the Interoceanic Canal, bearing in any manner on the study, construction, or improvement and operation of the canal or of its appurtenances, as well as the privileges attached to the same, and all contracts or agreements with third parties.

Fourthly. Of all rights of any nature and description, part ownership, or any other rights whatsoever, which may belong or accrue to the Interoceanic Canal Universal Company, now being liquidated, in the Panama Railroad at Colon, now worked and operated by an American company, known as the Panama Railroad Company, whose legal residence is in New York. The said rights shall be transferred such as they are, carrying with them all privileges entailed by them; and M. Gautron binds himself, in his official capacity, to invest with them the present company in the form and in compliance with all formalities required for such transfer by the laws of the United States of America.

The said rights shall be transferred, as well as the said property in full, such as they exist and with all that they entail.

Your petitioner further respectfully shows as follows:

That the said grant and contribution are made, or are to be made, by him, with the following reservations and under the following conditions, to wit:

First. The liquidation shall have and receive a part in the net profits and gains of the enterprise, amounting to 60 per cent of the said profits and gains, such as the same shall be determined and computed under articles 51 and 52 of the by-laws.

Secondly. Fifty thousand shares of entirely paid-up stock shall be given to the Government of the United States of Colombia, as prescribed by the extension act of December 26, 1890.

Thirdly. The rights of every nature and description belonging to the receivership in the Panama Railroad, and ceded by M. Gautron, as set forth in paragraph 4 above, shall become the property of the new company from the date of the meeting provided for by article 75 of the constitution and by-laws. No pecuniary compensation is required of the new company for the cession of said rights, but they are transferred on the condition and with the full understanding that said transfer shall be void if the canal be not completed within the time appointed by the grant. Should the work not be completed within the said period of time, the said rights shall revert to the liquidation.

If, contrary to all expectations, the meeting in question should fail to take the necessary measures to complete the canal, or if the measures thus taken by said meeting should fail of execution, by reason of impossibility to carry them out, the present company would still retain the said rights accruing from the railroad aforesaid; but it would have to pay to the liquidation a sum of 20,000,000 francs as an indemnity, while the liquidation's share in the gains and profits of the new company would then be equal to one-half of said gains and profits, without further previous deduction than such as is provided for by paragraphs 2 and 3 of article 51.

Fourthly. Until the full completion of the canal M. Gautron shall have power, in his capacity as liquidator, to appoint a controlling or supervising committee, composed of three members selected, as much as possible, from among the engineers of bridges and roads and finance inspectors, in order to inspect the progress of the work, the condition and maintenance of the plant and of the real property, as well as the accounts kept in relation to these various objects.

The compensating of this committee shall be at the expense of the new company.

Your petitioner further shows that it is proper for him to submit to the civil tribunal of the Seine, for ratification and approval, the conditions of the said grants and contributions, and the constitution and by-laws of the company formed for the completion of the canal.

Wherefore your said petitioner, acting in his official capacity, respectfully requests and prays the honorable president and associate justices

of this court purely and simply to ratify and approve the purport and conditions of the grants or contributions intended to be made by the liquidator for the Universal Company of the Panama Interoceanic Canal to the New Panama Canal Company now in process of formation, as well as the constitution and by-laws of the last-mentioned company.

All proper reservations being made, justice will be done.

(Signed)

A. DE BRIEVILLE.

Having considered the order issued by the president of the court, dated the 27th day of June, 1894, appended to the said petition and directing:

That this be communicated to the commonwealth attorney, and that Mr. De Boislisle, vice-president, is hereby appointed to make a report. Done at the palace of justice, Paris, on the 27th day of June, 1894, and signed BAUDOUIN.

Having considered the written opinion of the commonwealth attorney, likewise appended to the said petition, which opinion is thus conceived: The attorney for the commonwealth refers the matter to the tribunal of justice; signed CABAT.

Having considered articles 10 and 11 of the act of July 1, 1893, which articles are thus framed:

ART. 10. All acts tending to alienate any assets of the company, all contracts entailing a transfer or contribution of the whole or of part of the assets of the concern, emanating from the liquidator of the Universal Company of the Panama Interoceanic Canal, shall be subject to the approval or ratification of the civil tribunal of the Seine, who shall, on the report of one of the justices, pass on the question in open court.

ART. 11. All decrees of approval and ratification rendered in accordance with the preceding article shall be published within a term of ten days in the "Journal Officiel" and in the "Journal Officiel (commune edition)."

This decree may be attacked by the shareholders, by the mandataire of the holders, and by other creditors of the company within a delay not exceeding one month from the date of the publication aforesaid. The civil tribunal shall adjudicate the question within the space of one month, as in the case of matters demanding immediate and summary adjudication. The appeal from such decision must be entered within ten days from the time of notification of said judgment to the party in person or at his domicile.

Having heard at the sitting of the court M. de Boislisle, vice-president, in his report, and M. Cabat, assistant attorney for the commonwealth, in his opinion, and having deliberated upon the same in accordance with law;

Whereas it appears from the terms of article 5 of the constitution and by-laws of the New Panama Canal Company, which constitution and by-laws have been duly acknowledged before Lefebvre and his colleague, notaries in Paris, under an act of June 26, 1894, that Gautron, acting in his official capacity as liquidator for the Universal Company of

the Panama Interoceanic Canal, has declared himself as ceding or contributing to the said company newly formed:

First. All rights whatsoever accruing to the old company by virtue of the laws of the Government of the United States of Colombia, dated May 18, 1878, and December 26, 1890, as well as those accruing from all decrees, acts, or facts having followed upon these laws in the course of their execution, and all advantages accruing therefrom and stipulated by these laws and decrees; together with all territory and real estate granted and ceded unto the interoceanic company now in process of liquidation, or acquired by the same; all this provided the new company fulfill the conditions prescribed and imposed by the laws and acts passed in prolongation or extension of the grant, and provided it discharge and pay all sums and indebtedness remaining due to the Colombian Government by the old company.

Secondly. The work already done and accomplished, the plants, workshops, buildings, hospitals, plant mounted and unmounted, and the stores, etc., belonging to the liquidation of the Universal Company of the Panama Interoceanic Canal, as well as all deposits which may have been made by the said company now in process of liquidation.

Thirdly. The plans, estimates, surveys, and specifications, and all documents whatsoever gathered and collected by the Universal Company of the Panama Interoceanic Canal, bearing in any manner on the study, construction, or improvement and operation of the canal and its appurtenants, as well as the privileges attached to the same, and all contracts or agreements with third parties.

Fourthly. All rights of any nature and description, part ownership, or any other rights whatsoever which may belong or accrue to the Interoceanic Canal Universal Company now being liquidated, in the Panama Railroad at Colon, now worked and operated by an American company known as the Panama Railroad Company, whose legal residence is in New York. The said rights being transferred, such as they are and exist, carrying with them all the privileges which they entail; and M. Gautron binding himself, in his official capacity, to invest with them the present company in the form and in compliance with all the formalities required for such due and valid transfer by the laws of the United States of America.

Whereas, moreover, the said rights are to be transferred, as well as the said property, such as they exist and with all that they entail, and whereas these cession or grant and contribution have been made by Gautron in his official capacity, with the following reservations and under the following conditions, to wit:

First. The liquidation shall have and receive a share in the net profits and gains of the enterprise, amounting to 60 per cent of the said profits and gains, such as the same shall be determined and computed under articles 51 and 52 of the constitution and by-laws.

Secondly. Fifty thousand shares of entirely paid-up stock shall be given to the Government of the United States of Colombia, as prescribed by the extension act of December 26, 1890.

Thirdly. The rights of every nature and description belonging to the liquidation in the Panama Railroad, and ceded by M. Gautron, as set forth in paragraph 4 above, shall become the property of the new company from the date of the meeting provided for by article 75 of the constitution and by-laws. No pecuniary compensation is required of the new company for the cession of these rights, but they are transferred on the condition and with the full understanding that said transfer shall be void if the canal be not completed within the time appointed by the grant. Should the work not be completed within the said period of time, the said rights shall revert to the liquidation. If, contrary to all expectations, the meeting in question should fail to take the necessary measures to complete the canal, or if the measures thus taken by the said meeting should prove impossible of execution, the present company would still retain the said rights accruing from the railroad aforesaid; but it would be bound to pay to the liquidation a sum of 20,000,000 francs as indemnity, while the liquidation's share in the gains and profits of the new company would then be equal to one-half of the said gains and profits, without further previous reduction than such as is provided for by paragraphs 2 and 3 of article 51. Consequently the said rights shall remain inalienable in the hands of the new company aforesaid either until the payment of the said 20,000,000 francs or until the full completion of the canal.

Fourthly. Until the full completion of the canal, M. Gautron shall have power, in his official capacity, to appoint an inspecting or supervising committee composed of three members, to be selected as far as possible from among civil engineers and finance inspectors, in order to inspect the progress of the work, the condition and maintenance of the plant and real property, as well as the accounts kept in relation to these various subjects. The compensation of this committee shall be at the expense of the new company.

Whereas, according to the terms of article 51 of the constitution and by-laws of the said new company the annual proceeds of the enterprise shall be used to pay and discharge:

First. The share in the gains and profits stipulated and reserved to itself by the Government of the United States of Colombia, according to the terms of the grant.

Secondly. The costs of maintenance and the operating expenses, the expenditures entailed in the management of the concern, and, generally speaking, all charges incurred by the company, as well as the payment of interest and the redemption of all loans which may have been contracted.

Thirdly. The deduction of one-twentieth levied on the net profits after the settlement and cancellation of all items of indebtedness above enumerated, the said deduction to be applied to the formation of the legal reserve fund.

Fourthly. Five per cent of the capital stock, the same to be applied by the general meeting as the council of administration may advise,

both to the formation of the redemption fund which is to be established under article 55 and to the payment of interest on unredeemed shares.

Whereas, according to the terms of article 52, the net gains and profits of the enterprise will consist in whatever will be left of the annual proceeds after deduction of the various items enumerated in the preceding article hereof, while 5 per cent of these net profits will be set apart for the benefit of the council of administration, and the surplus shall go, 40 per cent to the shares created and 60 per cent to the Interoceanic Canal Universal Company now in progress of liquidation;

Whereas, finally, by the terms of article 75, when the expenses incurred for the work done on the canal and for the settlement of obligations resulting from the contribution made Gautron in his official capacity as liquidator shall have reached a sum equal to at least one-half of the capital stock (excluding nonspecies portions of the same), the results then achieved from the work already done and the consequent decisions to be taken for the future of the enterprise shall be passed upon by a special technical commission brought together at some previous and opportune time, the said commission to consist of two members designated by the council of administration of the present company and of two persons named by the liquidation of the former Universal Company for an Interoceanic Canal, together with a fifth member whom the other four shall designate, and who shall be president of the said commission, but who, in case the other four members should fail to agree, shall be appointed by the president of the tribunal of commerce for the department of the Seine;

Whereas the council of administration shall be bound to make public the report made by this commission, and to summon an extraordinary or special general meeting;

Whereas this meeting shall have to deliberate on ways and means to insure the completion of the work and on the stipulations hereinabove set forth, article 5, paragraph 4, number 3; whereas the constitution and by-laws in question must be submitted, by the terms of article 10 above mentioned of the law dated July 1, 1893, to the tribunal for ratification, touching the contributions intended to be made to the New Panama Canal Company by Gautron in his official capacity, and whereas this ratification is prayed for by Gautron;

Whereas the said contributions are within the competency of the liquidator, according to decrees which appointed him with the broadest powers, notably with that of ceding or contributing to a new company all or part of the company's assets; whereas the conditions stipulated for the benefit of the Universal Company of the Panama Interoceanic Canal seem to be in accord with its own interests, and therefore it is proper to ratify and approve the agreement declaring these contributions and conditions;

For these reasons the court, leaving unimpaired the right of shareholders, of the attorney or mandataire of obligation holders, and of other creditors of the company to intervene and make objection under article 11 of the law dated July 1, 1893,



Does hereby approve and ratify, purely and simply, the constitution and by-laws of the New Panama Canal Company, as received by Lefebvre and his colleague, notaries, in Paris, on the 26th day of June, 1894, touching the contributions made by Gautron in his capacity as liquidator of the Universal Company of the Panama Interoceanic Canal, and the court hereby orders that the present decree be published within the space of ten days in the "Journal Officiel" and in the "Journal Officiel (Commune edition)," according to article 11 of the law of July 1, 1893.

Signed: Baudouin, de Boislisle, and Lasnier. Done and adjudged by Messrs. Baudouin, president; de Boislisle, vice-president; Laporte, judge; Tassart, supernumerary judge; Le Berquier, supernumerary judge, in the presence of Monsieur Cabat, assistant attorney for the Commonwealth, attended by Lasnier, clerk, June 29, 1894.

The order was signed by the honorable president of the court, by the reporting judge, and by the clerk.

Recorded in Paris July 11, 1894, folio 50, third sub-division. Received 9 francs and 38 centimes, decimes included.

---

#### EXHIBIT L.

#### JUDGMENT OF AUGUST 8, 1894, DECIDING AGAINST TIERCE OPPOSITIONS TO JUDGMENTS OF JUNE 29, WHICH APPROVED CONTRIBUTION BY THE LIQUIDATOR TO THE NEW COMPANY, ETC.

[Taken from the minutes of the clerk's office of the civil tribunal of first instance of the Department of the Seine sitting at the Palace of Justice at Paris.]

The civil tribunal of first instance of the Department of the Seine, sitting at the Palace of Justice at Paris, has rendered in public session of the first chamber the following judgment:

SESSION OF WEDNESDAY, AUGUST 8, 1894.

Between M. Gautron, judicial administrator, residing at Paris, rue Tronchet, No. 13, acting as administrator liquidator of the Universal Company of the Interoceanic Canal of Panama, the headquarters of which are at Paris, rue de la Victoire, No. 63 bis.

Appointed to the said functions by judgment of the chamber of the council of the civil tribunal of the Seine, dated July 21, 1893, recorded;

Defendant against tierce opposition, defendant against intervention, appearing, submitting brief, and arguing through Maître Lourtaunau, advocate, assisted by Maître de Biéville, solicitor,

On the one part,

And:

First, M. Georges Émile Lemarquis, judicial administrator of the civil tribunal of the Seine, residing at Paris, rue Louis le Grand, No. 3;

Acting in the character of judicial mandataire of the bondholders of the Panama Company;

Appointed to the said functions by judgment of the chamber of the council of the civil tribunal of the Seine, dated July 4, 1893, recorded;

Plaintiff in tierce opposition, appearing, briefing, and arguing by Maître ———, advocate, assisted by Maître Dubourg, solicitor.

Of the other part.

Second. M. Pierre Couaillier, janitor, residing at Paris, rue de Lille, No. 65,

Plaintiff in tierce opposition, appearing, concluding, and arguing by Me. X., advocate, assisted by Maître Legrand, solicitor.

Third. M. Muracciole, residing at Muracciole (Corsica), intervenor, appearing briefly and arguing by Maître X., advocate, assisted by Maître Dumesnil, solicitor.

Fourth. M. Duhamel, residing at Paris, rue de l'Aqueduc.

Fifth. M. Leprince, residing at Paris, rue Aubry de Boucher.

Sixth. M. Pollike, residing at Paris, etc.

[Here follow names and addresses of thirty-eight persons,]

Plaintiffs by intervention, defendants by tierce opposition, appearing briefly, and arguing by Maître X., advocate, assisted by Maître Ernest Jacob, solicitor.

Of the last part.

Without their present characters being able to prejudice in any way the rights and interests of the respective parties.

#### POINTS OF FACT.

Paragraph 1. Tierce opposition of M. Lemarquis, in his character aforesaid, to the judgment of June 29, 1893, which approves the contribution made by M. Gautron, in his character aforesaid, to the New Panama Canal Company.

According to the document of Fabre, bailiff at Paris, dated July 7, 1894, M. Lemarquis, in his said character, has caused to be given to M. Gautron, in his said character, notification to appear before the first chamber of the civil tribunal of the Seine in order that:

Whereas, by judgment of the first chamber of the civil tribunal of the Seine, dated June 29 last, recorded, the tribunal approved the contribution made by M. Gautron, in his said character, to the New Panama Canal Company, an anonymous association now being formed, but reserving expressly, under the terms of article 11 of the law of July 1, the right for M. Lemarquis, in his said character, to proceed against said judgment by tierce opposition;

Whereas, it is not, at least up to the present time, demonstrated to the appearer, in his said character, that the bondholders he represents consider the agreement aforesaid advantageous for them;

Whereas, in view of the importance of the interests involved by that agreement, it is not possible for the appearer, in his said character, to

take a definitive part without being previously, by all the means in his power, informed of the views of his principals;

That it is important to him, therefore, to reserve provisionally all their rights, and especially to furnish them, by instituting tierce opposition, the opportunity to intervene in the discussions, if they see fit, under the terms of article 2, paragraph 3, of the law of July 1, 1893.

For these reasons, [he asks] to be admitted in his said character as a tiers opposant to the execution of the judgment aforesaid of June 29 last; on the merits [he asks] to have a determination as may be proper after the tribunal shall receive information as to the merits of the tierce opposition;

[Asks] to have M. Gautron, in his said character, condemned in all the costs.

[Gautron answers, claiming that the purely formal tierce opposition should not be allowed, as it is very urgent for him to arrive at the constitution of the new company and to avoid forfeiture of the concession. He asks accordingly to have Lemarquis declared inadmissible.]

Paragraph 2. Defense by the tierce opposition, of M. Lemarquis, in his said character, to the judgment of June 29, 1894, which approves the contract containing the eventual cession to the General Company, the Crédit Lyonnais, and to the Crédit Industriel and Commercial of 545 lottery bonds of the Universal Panama Canal Company.

According to document of Fabre, bailiff at Paris, dated July 7, 1894, M. Lemarquis, in his said character, gave notification to M. Gautron, in his said character, to appear within eight full days before the first chamber of the tribunal, in order that;

Whereas, on the 29th of June, 1894, there was entered a judgment of the first chamber of the civil tribunal of the Seine, which pronounced approval of the contract containing an eventual cession by M. Gautron, as liquidator of the Panama Company, to the General Company, the Crédit Lyonnais, and to the Crédit Industriel and Commercial, of 545 lottery bonds of the said company.

And moreover, for the reasons already stated in the tierce opposition to the judgment which approves the contribution of M. Gautron to the New Panama Company, as mentioned above;

In due form, [asks] to have M. Lemarquis, in his said character, received as a tiers opposant to the judgment aforesaid of the 29th of June, 1894;

On the merits, to have a decision as may be right on the merits of the tierce opposition after information shall be furnished to the tribunal;

To have M. Gautron condemned in the costs in any event.

[To this Gautron responded, asking (after again speaking of the urgency of arriving at the constitution of the new company before the expiration of the prorogued concession) for the rejection of Lemarquis's tierce opposition, and a decision that the judgment of approval should be executed.]

Paragraph 3. Defense by tierce opposition of M. Couaillier to the three judgments of June 29, 1894.

According to document of Gillet, bailiff at Paris, dated July 26, 1894, M. Couaillier caused notification to be served upon M. Gautron, in his aforesaid character;

To appear on Thursday, the 2d of August, 1894, before the first chamber of the civil tribunal of the Seine in order that;

Whereas, he is owner of three bonds of 500 francs, 5 per cent of the Universal Company of the Inter-oceanic Canal of Panama, numbers 41,746 to 41,748, and of a share of stock of the said company, number 335,973;

That in those characters he has the right to enter tierce opposition to the judgments rendered by the first chamber the 29th of June, which have approved:

First. The by-laws of the New Panama Company constituted by M. Gautron, liquidator of the old company, and by other persons.

Second. The settlement made between it and M. Eiffel.

Third. The agreement entered into between him and three establishments of credit.

Paragraph first. As to the document constituting the company: That this document establishes the by-laws of a new company called the Universal Company of the Canal of Panama; that according to the terms of that document M. Gautron contributes in his aforesaid character to the new company, especially the rights of all kinds, shares of ownership whatsoever of the company of which he is liquidator as to the railroad from Panama to Colon, operated by an American company called the Panama Railroad Company, with the condition of forfeiture that the canal shall be terminated in the time fixed by the act of concession;

That moreover the by-laws provide that if a meeting, which is provided for by article 75, does not take the necessary measures for the accomplishment of the canal, or if the measures so taken by it do not succeed, the said rights as to the railroad shall remain acquired by the new company, on paying a sum of 20,000,000 by way of indemnity, and in that case the part of the profits to go to the liquidation will be the one-half of the profits of the new company;

That it is impossible to admit that the Panama Railroad, which constitutes the most considerable element of the assets of the liquidation, can be abandoned, even conditionally, for a sum of 20,000,000, since it has cost more than 93,000,000 to the company in liquidation, and that its normal traffic has reached, from 1874 to 1880, that is in six years, for the 70,000 shares of 50 francs each, 99 per cent dividend, in addition to an annual interest of 5 per cent;

That it is to be remarked that these 20,000,000 will be taken from the resources of the new company, which have been furnished them in great part by the liquidation of the old company;

That such an abandonment ought to result from the single fact of a recognition at some time that the canal is not susceptible of construction;

That the new company will ever have an interest in sacrificing the canal to continue the profitable operation of the railroad; that all the

projects of reconstitution of the Panama affair have had up to the present for their basis the ownership of the Panama Railroad in the patrimony of the liquidation. If these companies do not arrive at the accomplishment of the canal, this cession of the railroad will be disadvantageous.

Paragraph 2. Eiffel agreement: That by another judgment of the same day, of the first chamber, the civil tribunal of the Seine approved a transaction had between M. Gautron, in his character aforesaid, and M. Eiffel, by the terms of which the latter agreed to subscribe shares to the value of 10,000,000 in any new company having for its object the reconstitution of the work of Panama, and in which it has been further agreed that for the bills of exchange, of which he is the holder, M. Eiffel shall receive in payment lottery bonds of the company in liquidation, entirely paid up, calculated at 125 francs;

That by means of the making of those agreements all litigation pending between M. Eiffel and the Panama Company was to be ended;

That this transaction is contrary to the interests of the liquidation; that not only the credits of M. Eiffel are illusory, but that he ought to restore, without any compensation, considerable sums;

That in any event it is inadmissible that M. Eiffel can free himself by a transaction from restitutions which are at his charge, by means of a subscription to shares, which, the day after the constitution of the company, he can resell to the public, perhaps even at a premium;

That the spirit of the law of July 1, 1893, indicates that the restitutions to be made by the debtors of the company ought to be made in money deposited at the Bureau of Deposits and Consignments and distributed among the company creditors;

That consequently the transaction had with M. Eiffel is prejudicial to the interests of the company in liquidation.

Paragraph 3. Agreements with the three credit companies.

That, by a third judgment, the civil tribunal of the Seine approved an agreement made between M. Gautron, in his character aforesaid, and the three credit establishments, the Crédit Lyonnais, the general company to advance the development of industry and commerce, and the general company of the Crédit Industriel and Commercial;

That, by the terms of this agreement, M. Gautron sells conditionally to those establishments of credit lottery bonds of the company in liquidation, and this up to a maximum number of 545,000 bonds, at 90 francs each;

That it is inadmissible that the liquidator should abandon at the price of 90 francs these lottery bonds, which are quoted on the Bourse at 125 francs, and which he himself transfers to M. Eiffel at the price of 125 francs;

That, besides, these lottery bonds are susceptible of returning to their value of issue, viz, 360 francs;

That, on the other hand, the law of July 15, 1889, which authorized the liquidator to negotiate the lottery bonds not yet placed, without limitation of price or of interest, has given that authorization only upon the following conditions:

"In case the liquidator shall make contribution or cession of all or part of the liquidation [sic] to a company created for the accomplishment of the canal (an hypothesis which is realized), the new company will not be able to issue the bonds at that time not placed on the terms, except on the conditions determined by the law of 1888, as regards the minimum of the price of issue and as to interest."

That by the terms of this law the cost at issue can not be less than 360 francs, comprising the 60 francs reserved for the payment of prizes and sinking and the annual interest, to descend [sic] below 3 per cent of the nominal capital;

That thus the cession at a low price of those bonds made by the liquidation is contrary to law;

That moreover the appearer, far from disapproving the project of the reconstitution of the work of Panama, is quite ready to give his adhesion as concerns that to any combination which will assure respect for the law, safeguard the patrimony of the liquidation, and favor the accomplishment of the canal;

That this end can be attained without more than the resources of the liquidation;

For these reasons [he asks] to be received as tiers opposant to the three judgments aforesaid;

To have the three judgments in question declared void and of no effect;

Consequently, to have refused the approval of the by-laws of the New Panama Canal Company made before Lefebvre and his colleague, notaries at Paris, June 26, 1894, of the transaction with M. Eiffel, and of the agreement entered into with the Crédit Lyonnais, the General Company, and the Crédit Industriel and Commercial;

To have the costs allowed;

By a document of the Palace, dated July 31, 1894, recorded, M. de Biéville, advocate of M. Gautron, in his character aforesaid, served upon Me. Legrand, solicitor of M. Couaillier, his conclusions or brief, asking that it may please the tribunal:

That, after having thus given his adhesion to the principle of reconstitution of the Panama Company, the tiers opposant may abstain from indicating the means of attaining the threefold end which he proposes;

That he may limit himself to criticising the combination offered by the liquidator for the acceptance of the bondholders;

As for what concerns the contribution to the New Panama Canal Company:

Whereas these observations of M. Couaillier have not escaped the attention of the liquidator of the Panama Company; and that all the efforts as well of the predecessors as of himself have been given to defending the patrimony of the liquidation, and especially its rights in the Panama Railroad; that the tiers opposant himself recognizes in referring to them that the preceding projects of reconstitution reserved to the liquidation the ownership of its rights in the Panama Railroad, if the canal should not be finished;

But, whereas, those projects have not resulted in anything;

That the date for the expiration of the period allowed in the prorogation of the concession is imminent;

Whereas, to attract large capital to attempt anew the piercing of the isthmus, it has been indispensable to give it confidence in the enterprise;

Whereas, while doing what that necessity requires, M. Gautron, in his character aforesaid, has reserved to the liquidation one-half of the profits to be received in carrying on the railroad;

That, under the circumstances, it is for the bondholders either to accept the combination proposed, or to renounce all hope of reviving the matter, and to proceed purely and simply to realization and to the distribution of the assets realized;

Whereas it is not serious to pretend that the accomplishment of the canal can be attained with the mere resources of the liquidation;

As to what concerns the Eiffel transaction:

Whereas the credits of M. Eiffel, on account of the works which he has executed during the liquidation, can not be denied;

Whereas in his estimates M. Couaillier takes no account either of the difficulties of litigation or of the chances of recovery;

Whereas the Eiffel transaction has already been approved by judgment of May 11, 1894, notwithstanding the intervention of the bondholder, M. Pinchot, an intervention soon abandoned by him;

Considering, finally, that article 313 provides: "The shares shall be in the names of the holders [not to bearer] until they are entirely paid up, in conformity with the law of August 1, 1893."

Besides, no share can be negotiated and the council of administration can not authorize the transfer until it is fully paid up;

That it is necessary, then, for M. Eiffel to risk a capital of 10,000,000 to pay up his shares before he can negotiate them;

Whereas there is nothing in the law of July 1, 1893, that forbids the liquidator or the mandataire of the bondholders to enter into transactions, provided they comply with the provisions of that law.

As for what concerns the sale of lottery bonds:

Whereas the first complaint of the tiers opposant falls before this observation; that the price of 90 francs has been fixed on account of the number of the lottery bonds to be sold;

That this sale is purely within the rights of M. Gautron in his said character, and that the liquidator is interested in offering the bonds at the same price and under the same conditions, and in preference to shareholders and bondholders of the Panama company in liquidation.

Whereas it is not correct to say that this sale is contrary to the special laws regulating the Panama company;

Whereas the law of July 15, 1889, authorized the liquidator to negotiate, without limitation of price and without interest, the lottery bonds, the issue of which was authorized by the law of June 8, 1888, and which were not yet issued on the 4th of February, 1889;

That it is only in case the liquidator should make contribution or cession of the whole or part of the assets of the liquidation that the new

company would not be able to issue the bonds at that time not issued otherwise than under the conditions determined by the law of June 8, 1888, so far as concerns the minimum price and the interest;

Whereas this last event has not taken place; that it is the liquidator who realizes on the lottery bonds and not the new company, which is not yet definitively constituted;

That, consequently, this realization is free from the conditions of limitation of price and of the fixing of interest, under the terms of the first paragraph of the first article of the law of July 16, 1889;

For these reasons [he asks] to have M. Couaillier declared inadmissible, and in any event unfounded in his tierce opposition to the three judgments of approval rendered by this chamber on June 29, 1894, recorded;

In doing that, to declare that the said judgments shall have their full and entire effect, and to condemn M. Couaillier in all the costs, allowance being made for the fees of Me. de Biéville, solicitor.

Paragraph 4. Defense by intervention of M. Muracciole. According to document of the Palace, dated February 28, 1894, Me. Dumesnil, solicitor, constituted on behalf of M. Muracciole, submitted conclusions showing his constitution as solicitor and asking that it might please the tribunal;

Whereas the assets of the Panama Company, which the execution of these agreements exposes to new risks, constitutes the gage of the creditors of the old company, and it can not belong to the liquidator, who represents the shareholders but not the creditors, to dispose of that gage so long as he has not paid the creditors interested in it;

Whereas the appearer is a creditor of the Universal Company of the Panama Canal by virtue of judgments dated April 11, 1893, which have passed into the condition of *res judicata*;

That he is master of his rights, and that he intends to exercise them upon the assets, such as they are to-day, without submitting to the risks of new combinations;

That, if it suits the interests of the shareholders, who have nothing to claim, that, after the extinction of the rights of the creditors, some bondholders may constitute themselves as a company to expose the gage of the creditors in a new adventure, in which they have everything to gain and nothing to lose, the interest of the creditors is altogether different, and that it can not belong to the shareholders to put a check to their right, respect for which is obligatory upon all, and more especially when the creditor has an ordinary credit verified by judgment, the beneficiary of which in the last analysis has placed confidence in the company capital and in the associates;

Whereas the right of tierce opposition, reserved by article 11 of the law of July 1, 1893, is moreover reserved by the judgments themselves, so that the present pleading is as admissible in law as it is just in its foundation;

That M. Couaillier, having introduced a principal demand of tierce



opposition to these three judgments, the appearer intends to intervene in the said proceeding;

For these reasons [he asks] that the appearer may be received as an intervenor in the pending proceeding of tierce opposition between the parties;

In doing this to have himself declared a tierce opposant to the three judgments of June 29, 1894;

To have it declared that those judgments are without effect and void;

To have prohibited the execution of the agreements approved by the said judgments, and this on pain of being personally responsible for the credit of M. Muracciole, both principal and interest;

To have it ordered that the assets realized and to be realized shall remain unchanged, subject to the credit of the appearer, and that they may not be exposed to the risks of any enterprises;

And to have the costs adjudged, with allowance of fees of Me. Dumesnil, solicitor;

By document of the Palace, dated July 31, 1894, Me. de Biéville, solicitor of M. Gautron, in his character aforesaid, served upon the solicitors in the case conclusions asking that it might please the tribunal that the law has organized a special regulation of the liquidation of the Panama Company;

That following the spirit of judicial liquidation and bankruptcy in commercial matters, it has subordinated the exercise of individual rights to the general interests;

That, consequently, it has suspended, from the promulgation of the said law, all suits in course, begun either by holders of bonds or by any creditors, as well as all proceedings for taking possession of property or execution, even those actually in course, against the properties, movable or immovable, belonging to the said company;

That whereas article 10 provides expressly for the cession or contribution of the whole or the part of the company assets by the liquidation of the Universal Company of the Interoceanic Canal of Panama;

That the said article only requires the liquidator to submit all acts of realization of the assets and all contracts carrying cession or contribution to the civil tribunal of the Seine, which is to decide in public session upon the report of a judge;

That, finally, every judgment of approval is to be published, and can be attacked by tierce opposition;

Whereas it results from these provisions that if M. Muracciole has the right to come and produce before the tribunal the reasons which make him consider as disadvantageous the combination for the reconstitution of the Panama Canal Company, he can not oppose the transactions approved with an objection of principle drawn from the ordinary law;

For these reasons [he asks] to have it declared that the intervention of M. Muracciole is inadmissible in law, and to declare him unfounded on the merits in his tierce opposition to the three judgments of approval rendered by this chamber on June 29, 1894, recorded;

In doing this, to declare that the said judgments shall have their full and entire effect;

And to condemn M. Muracciole in the costs, with the allowance of the fee of M. de Biéville.

Paragraph 5. Defense by intervention of M. Duhamel and consorts.

According to the document of the Palace dated August 1, 1894, Me. Ernest Jacob, solicitor of M. Duhamel and consorts, served upon Me. de Biéville, solicitor of M. Gautron, in his character aforesaid, conclusions in which he constitutes himself for M. Duhamel and consorts, and asking that it may please the tribunal:

Whereas the appearers, holders of 4,000 bonds of the Panama Company, have the right to intervene in the case in order to resist the demand of the said M. Couaillier;

Whereas the different agreements made by the liquidator are in conformity with the interests of the Panama bondholders;

That, on the other hand, the demand of Couaillier would result in a liquidation disastrous and injurious to the bondholders;

That, under these circumstances, the appearers unite with Gautron, in his said character, to ask the rejection of the tierce opposition instituted by M. Couaillier;

For these reasons [they ask] that they may be received as intervenors in the cause pending between MM. Couaillier and Gautron;

On the merits, to have it declared that the tierce opposition should be rejected;

Declared, consequently, that M. Couaillier is inadmissible, or, at all events, unfounded in his demands to dismiss them, and to have him condemned in the costs, including those of the intervention, with allowances of the fee of M. Ernest Jacob, solicitor.

By document of the Palace, dated August 1, 1894, Me. Ernest Jacob gave notice to Me. de Biéville for the session of August 2, 1894. By a last document of the Palace of August 2, 1894, Me. de Biéville, solicitor of M. Gautron, in his said character, submitted conclusions asking that it might please the tribunal:

To sustain M. Gautron, in his said character, in declaring proper the intervention of M. Duhamel and consorts, and to condemn M. Couaillier in the costs, with allowance of fees to M. de Biéville.

Paragraph 6. Joining of the proceedings. In this condition of the case, the different demands in tierce opposition and interventions have been joined and put in order for the session of this day, at which the advocates of the parties, assisted by their solicitors, have presented themselves at the bar, and explained orally the conclusions previously submitted by them, and have asked judgment for their respective clients.

The public minister has been heard in his conclusions and observations.

In this condition, the affair presents for judgment the following questions:

POINTS OF LAW.

Should the tribunal, as a matter of law, receive M. Lemarquis in his said character as tiers opposant to the judgment of June 29, 1894?

[The other questions are then formally stated, and the tribunal names over the advocates who argued the matter, and proceeds:]

The causes being joined on account of their relations with each other and determining upon the whole by one and the same judgment, in an ordinary matter and in first resort;

Considering that by the terms of article 5 of the by-laws of the company formed for the accomplishment of the Panama Canal, according to a document made July 26, 1894, before Lefebvre and his colleague, notaries at Paris, Gautron in his character of liquidator of the Universal Company of the Interoceanic Canal of Panama, declares that he contributes to the new company on the conditions indicated in the said by-laws, to wit:

First [quoting article 5]. That with a view to obtaining the concurrence necessary in the subscription of the capital of the company for the accomplishment of the canal, and to assure the acquisition of the necessary funds which will have to be paid out in that case, Gautron has requested the financial aid of the General Company, the Crédit Lyonnais, and the Crédit Company Industriel and Commercial;

That by non-notarial documents, dated June 26, 1894, recorded, these three establishments promised to buy from him in the case provided for, and each one in a proportion agreed upon, for the price of 90 francs per bond, lottery bonds of the Interoceanic Canal Company entirely paid up or freed with regard to the civil company, and these to the extent of a maximum quantity of 545,000 bonds;

That, finally, by the terms of the transaction, had the 26th of January, 1894, between the liquidator of the Panama Canal Company and the mandataire of the bondholders and Gustave Eiffel, by which the latter agreed to subscribe shares up to the amount of 10,000,000 in any new company having for its object the reconstitution of the work of Panama, it was agreed that in case that subscription should be realized Eiffel should receive in payment of the bills of exchange he held on account of the work which he had done for the benefit of the liquidation, a corresponding quantity of lottery bonds entirely paid up and freed, and calculated at 125 francs per bond;

That for the case on the contrary in which a new company shall not be constituted, Eiffel engages himself to pay to the liquidator the net sum of 5,000,000 francs and abandon the bills, the liquidation on its side, abandoning 5,755 tons of iron, etc., deposited in his warehouses;

Considering that, according to the judgment of this chamber dated June 29, 1894, recorded, the tribunal has, on the demand of Gautron as liquidator, approved the acts above analyzed so far as they carry:

The first, a contribution made by the liquidator to the company of construction and the two others realizations of the assets;

That these judgments have been published in the Official Journal and in the Official Journal (edition of the Commune) of the 1st of July, 1894;

That tierce opposition has been introduced by Lemarquis, mandataire of the bondholders, and Couaillier, stockholder of the Universal Company, and bondholder of that company;

That Muracciole, creditor of the liquidation, has intervened in the tierce opposition of Couaillier, in which he has joined;

That Duhamel and others, as bondholders, have intervened in the said tierce oppositions, and concluded in favor of their rejection;

Considering that the said tierce opposition and intervention are admissible under the terms of Article 11 of the law of July 1, 1893;

On the merits:

As for the tierce opposition of Lemarquis as mandataire;

Considering that it has no object except to reserve the rights of the bondholders and enable them to intervene if they see fit;

That except Couaillier, holder of three bonds only, none of them have made use of that opportunity;

That it results from the documents submitted by Lemarquis, and especially from the correspondence of the bondholders, that they are by a very large majority favorable to the proposed combination;

That a very small number of these bondholders have pronounced in favor of the distribution of the assets, which distribution could give to each of those interested but a very small dividend and would necessarily carry with it the forfeiture of the concession, the definitive abandonment of the enterprise, and the loss without compensation of the works already made, of the immovable property, and of the greater part of the matériel;

That, under these circumstances, M. Lemarquis has justly believed himself authorized to join in the demand for approval made by Gautron, which he has done at the session.

As for the tierce opposition of Couaillier:

Considering that, far from claiming distribution of the assets and opposing the continuation of the canal enterprise, Couaillier declares himself ready to give his own adhesion to any combination for its accomplishment;

That he contends only that this end will be attained with no more than the resources of the liquidation, without its being necessary to get rid of part of the assets for the benefit of the new company, a getting rid of the legality of which and the advantages of which he disputes, especially as regards the rights of the liquidation in the railroad from Panama to Colon, and whereof he criticises the stipulations;

Considering that none of the combinations attempted since 1889 under divers forms for the reconstitution of the work of Panama has resulted in anything;

That it would be idle to inquire whether one or another of them would have been more advantageous if it had been possible to realize them;

That by the very force of things, and in view of the imminence of the date fixed for the forfeiture of the concession, the approval of the contract submitted to the tribunal can alone prevent that forfeiture;

That if the liquidator recommences the work at the risk and peril of the liquidation, as the tiers opposant seems to think proper, he will manifestly exceed the powers conferred by the judgments appointing him and by the law of July 1, 1893;

That he would fatally absorb all the resources of the liquidation, and expose himself to a certain check, since the canal can not be constructed without a new appeal for funds which a dissolved company can not make with any chance of success;

That, on the contrary, the acts of contribution and of realization of assets, the approval of which is asked, are within the powers of the liquidator; that their legality can not be seriously disputed; that their opportuneness is not less evident;

That the preceding attempts have all failed by reason of obstacles which their authors have met with when they attempted to get the capital necessary to recommence the work;

That it would be chimerical, before recommencing that work, and without waiting for the practical demonstration by serious experiments of the possibilities of accomplishing the work, to count upon outside aid which would continue to keep away or oppose to the liquidation unacceptable requirements; but it is legitimate to hope that such an experiment will revive confidence, and will dispose the national savings to new sacrifices;

That the liquidator should not be complained of, then, for having consecrated to the work undertaken by the new company a part of the resources of the liquidation, and still less for having interested in its success financial establishments whose concurrence will be necessary for new appeals for capital;

Considering as to what concerns especially the contribution of the rights as to the railroad from Panama to Colon, that it is the essential basis and condition of the new combination, not only on account of the necessary correlation of the two enterprises, but because it permits the assurance of a legitimate remuneration to the capital of the new company in case the accomplishment of the canal shall be finally abandoned;

That it is proper to remark that the cession of these rights is not (but) conditional;

That they will return to the liquidation if, the accomplishment of the canal, having been decided upon by the general meeting, it can not be terminated within the time fixed by the act of concession;

That this rescissionary clause guarantees completely in that event the interests of the liquidation, and that no criticism can be or is indeed directed against the by-laws under that heading;

That it is the same as to what concerns the giving to the new company of the said rights in the event of the accomplishment of the canal;

That the revenues of the railroad will be added, in that event, to the profits of the canal and benefit, consequently, the liquidation, which is to get three-fifths of the benefits of the enterprise;

That if these rights are to remain the property of the new company in case the general meeting does not take the necessary steps for the accomplishment of the canal, the liquidation will not receive, in that event, as the tiers opposant seems to believe, merely an indemnity of twenty millions of francs, but the half part of the profits;

That the only deductions authorized in that case, being the expenses of maintenance and operation and of administration, and the taking out of a twentieth for the reserve fund, the part of the new company in the revenues of the railroad will not exceed that paid to the liquidation;

That it is the less to be feared that the company will renounce for such a small remuneration the accomplishment of the canal, with the object of confining itself to the operation of the Panama Railroad because the works and the annuities paid to the Colombian Government will have at that time absorbed the whole or the major part of its capital in such a way that the company will find that it has bought for nearly 80,000,000 the half of the revenue of the railroad;

That the apprehensions manifested by Couaillier are, therefore, without foundation;

That the rights as to the railroad were, it is true, bought by the Panama Company at 93,000,000, but it is shown that the price was considerably increased by the regulation and also that the revenues of the railroad were artificially raised;

That if it is legitimate to count in the future upon a remunerative revenue, it is not less demonstrated that the sale en bloc for 20,000,000 francs of the half of that revenue constitutes an operation altogether to the advantage of the liquidation;

That it is proper to recall, on the other hand, that the liquidator, besides the influence and the part of the profits which will, in the contingency arising, belong to him in his character of subscriber, is assured by a set of provisions of the most precise kind of the means of effectively examining all the operations of the new company;

That without speaking of the commission of inspection, provided by article 5, paragraph 4, he has reserved the naming of the half of the members of the technical commission;

That, finally, the prohibition to sell shares before they are completely paid up and the limitation of the number of votes allowed to each shareholder in the general meeting appears to sufficiently protect those meetings against all speculation;

That the mandataire of the bondholders has thought, nevertheless, that it is proper to fortify further the guarantees offered by the by-laws to the liquidation, and has obtained from the principal subscribers, notably the Eiffel credit companies, an agreement not to cede or negotiate their shares, until the commission provided for by article 75 of the by-laws shall have made its report, and the general meeting shall have pronounced upon the continuation or stopping of the works;

That it is proper to sanction this act of Lemarquais;

As for what concerns the promised purchase of lottery bonds by the credit companies;

Considering that if the price of 90 francs is lower than the present quotation, it is sufficient to refute the objection which the tierce opposition undertakes to draw from that circumstance to remark that the course of the Bourse, subject to the fluctuations of speculation, can not serve as a basis for the sale en bloc of a considerable lot of values not yet issued;

That the price imposed on Eiffel in the document of January 26, 1894, can no more be taken as a means of comparison, the difference between the price of 125 francs stipulated in that document and the quotation at that time, constituting exactly one of the advantages conceded to the liquidation;

That, on the other hand, it is not necessary to dwell upon the objection of principle drawn from the law of July 15, 1889, the restriction invoked not applying to the liquidator, who is expressly authorized, on the contrary, to issue the bonds without limitation of price and without interest;

That it is proper to observe finally that the liquidator remains free not to profit by the unilateral engagement contracted by the credit companies, if the capital of the new company can be constituted without their aid; and, on the other hand, that the interests of the bondholders are safeguarded by the right of preference which is reserved to them;

That the annexed agreement of June 26, 1894, is then altogether to their advantage;

As to the transaction with Eiffel;

Considering that it has been approved upon the advice of three juriconsults designated by the attorney of the Republic;

That after a profound examination of the claim upon which it has been entered into, they have considered that that transaction was advantageous to the liquidation;

That this opinion has been shared by the chamber of the council, whose decision on that point is not susceptible of any attack;

That articles 10 and 11 of the law of July 1, 1893, do not authorize tierce oppositions except as to the stipulations carrying the realization of assets, to wit, the giving in payment of lottery bonds and the abandonment of the matériel;

That these stipulations have not been criticised by the tiers opposants;

That the latter is manifestly confused when he characterizes as illusory a debt contracted not by the Panama Company but by the liquidation, on the faith and for the profit of which Eiffel continued the works after the dissolution of the company;

That if the law of July 1, 1893, has prescribed the deposit at the *caisse des consignations* of the amount of the transactions, it has not forbidden the liquidator to receive other things than payments in money, and especially to stipulate for his benefit the right to be released from his debts in consideration for the turning over of values;

That in fact the method of settlement adopted is, as has been said above, advantageous for the liquidation;

That there is no occasion, therefore, even on this point to revise the approval pronounced by the judgment of June 29;

As for what concerns the intervention of Muracciole;

Considering that the intervenor, creditor of the Universal Panama Company, by virtue of a judgment of April 11, 1893, claims that the assets as they are shall be and should remain the gage of the creditors without its being permitted to the liquidator representing only the

shareholders to dispose of them and least of all to subject them to the chances of any new enterprise;

That he opposes himself on this ground to the execution of the contracts made by Gautron;

Considering that this pretension is contrary as well to the text as to the spirit of the law of July 1, 1893;

That this law has authorized, in principle, the liquidator to make, under the conditions which it has determined, all contributions and realizations of assets; that it intended that the creditors could not oppose these acts after they shall have been approved, as in conformity with the general interest;

That it is precisely to prevent them that it has suspended their suits and execution proceedings; that there is no occasion then, to dwell upon the tierce opposition of Muracciole;

As for what concerns the intervention of Duhamel and consorts, that it is proper for the above reasons to sustain their conclusions which ask for the rejection of the tierce opposition;

For these reasons;

The tribunal admits Lemarquis and Couaillier as tiers-opposants to the judgments of June 29, 1894;

Admits the interventions of Muracciole and Duhamel and others;

On the merits: declares Lemarquis, Couaillier and Muracciole unfounded in their tierce oppositions;

Orders the said judgments to be given their full and entire effect;

Approves, nevertheless, Lemarquis' engagement with the Eiffel credit companies and other companies concerning the time when the shares subscribed by them may be negotiated;

Applies to Lemarquis, Couaillier and Muracciole article 479 of the Code of Civil Procedure;

Consequently condemns them each to a fine of 50 francs, combines the costs, which include the expenses of Duhamel and consorts;

Condemns Couaillier and Muracciole in the said costs to the amount of a third for each;

Declares that the other third shall be borne by Lemarquis as mandataire;

Makes allowance to de Bievill and Jacob, solicitors, of their fees.

(Signed)

BOUDOUIN and LARNIER.

Done and adjudged in public session, etc.

---

**EXHIBIT M.**

**REPORT OF OCTOBER 8, 1894, OF COMMISSAIRES APPOINTED  
BY THE NEW PANAMA CANAL COMPANY TO VALUE THE  
CONTRIBUTIONS MADE TO IT BY THE LIQUIDATOR.**

[Does not seem to have been published.]

**GENTLEMEN:** In our constitutive meeting you selected us to make the report required by law and the by-laws upon the value of the contribu-



tions made to your company and upon the legitimacy of the advantages stipulated by articles 5, 6, 7, 8, 51, and 58 of the by-laws.

We here render you an account of the mission which you were pleased to confide to us.

## I.

The by-laws of the New Panama Canal Company, according to the document received by MM. Lefebvre and Champetier de Ribes, notaries at Paris, on the 26th of June, 1894, were the subject of profound preliminary examination on the part of M. Gautron, liquidator of the old company, and of M. Lemarquie, official mandataire of the bondholders.

In conformity with the special law of the 1st of July, 1893, they were afterwards submitted to the approval of the civil tribunal of first instance of the Seine, which approved them by judgment dated 29th of June. Some tierce oppositions having been put in to this judgment, a new judgment of the same tribunal, dated the 8th of August, decided against the opposants and maintained the provisions of the preceding judgment.

The authority of these decisions, which are to-day final, supported, besides, by reasonings of remarkable precision, suffice assuredly to demonstrate that the by-laws are of the most perfect regularity and that they embrace the best possible solution of the difficulties which the business of reconstituting the work of Panama has encountered. It is always to be remembered that the tribunal of the Seine had the charge of specially looking after the safeguarding of the interests of the stockholders or bondholders of the Company of the Interoceanic Canal of Panama.

If, then, the judicial control is of such a nature as to facilitate the accomplishment of the mission which you have confided to us, we are not the less obliged to examine and discuss, in conformity with the law of the 24th of July, 1867, the stipulations of the by-laws, the value of the contributions, and the equity of those stipulations from the point of view of the interests of the new company, with regard to the subscribers of money capital. Your commissaires had to deliver themselves to this work without regard to the particular circumstances passed upon by the judicial decisions.

## II.

The contribution made to your company by the liquidator of the old company of the Interoceanic Canal, and the advantages stipulated in behalf of that liquidation in return for that contribution, are settled by divers provisions of the by-laws which it is important to place before you.

These articles are thus worded: [Quoting the articles 5, 6, 7, 8, 51, 52, and 58; see by-laws, printed in full elsewhere.]

The articles which we recall to you, and the stipulations which they contain, have two different aspects, the one principal and concerning the accomplishment of the company's object, the other subsidiary and

which may be ultimately carried out in consequence of a decision to be taken by a special general meeting convoked under the terms of article 75.

We have, then, to take account of this double aspect, and we shall examine successively the situation which is produced at the same time for the liquidation and for the new capital in both of the two cases referred to.

### III.

There is to be examined what belongs to the construction and operation of the canal, which are the very objects of the new company as defined by its first article, as well as the contribution of the liquidator, which embraces the constitutive elements of that enterprise.

These different elements should be successively passed in review.

#### 1. CONCESSION.

"All rights," say the by-laws, "resulting in behalf of the company in liquidation from the laws of the Government of the United States of Colombia, dated the 18th of May, 1878, and 26th of December, 1890, as well as from the decrees, acts, and facts whatsoever following in execution of those laws, and all the advantages stipulated by those laws and decrees, together with all lands and immovable properties granted to the Inter-oceanic Company in liquidation or acquired by it.

"The whole with the charge of fulfilling the conditions of the laws and prorogations of the concession, and of paying all sums remaining due from the liquidation to the Colombian Government."

The concession of the Panama Canal, described in these terms by the by-laws, results from three documents emanating from the Colombian Government and sanctioned by the laws of that Republic.

The first determines the clauses and provisions of the concession made for ninety-nine years, beginning from the day on which the canal shall be opened in whole or in part to the service of the public, or on which the concessionaires or their representatives shall commence to receive payments for transit and for navigation.

The canal was to be finished and delivered to the service of the public within twelve years from the constitution of the company organized by M. Ferdinand de Lesseps—that is to say, before March 3, 1893, allowing, however, a supplemental period of six years.

Independently of the general clauses and provisions, there were given to the concessionaires the necessary public lands for the construction of the canal, as well as a strip of land 200 meters wide on each side of the canal, and besides 500,000 hectares of land to be chosen by the concessionaire company.

Finally, the Colombian Government reserves to itself a participation in the gross product of all that should be received from the enterprise, fixed, to wit:

At 5 per cent, during the first twenty-five years from the opening of the canal; at 6 per cent, during the following twenty-five years; at 7 per

cent, from the fiftieth to the seventy-fifth year, and at 8 per cent, from the seventy-fifth year to the end of the concession.

Following the suspension of the works of the old company, the Colombian law of December 26, 1890, was passed on the petition of M. Monchicourt, then liquidator of the old company.

A prorogation of ten years was granted, on condition that a new company of construction should be formed and should recommence the work of excavation in a serious and permanent manner, at the latest, by February 28, 1893.

Finally, the terms of the prorogation were definitively arranged in the following manner on the 4th of April, 1893:

The prorogation of ten years, given in article first of the law of 1890, to the liquidator of the Universal Panama Canal Company to remain in force under the conditions then stipulated, except as to the second, which was modified by the prorogation, until 31st of October, 1894, of the period within which the new company was to be constituted, and the works of the canal to be recommenced in a serious and permanent manner.

The term of ten years to commence to run from the date of the definitive constitution of the new company.

It is, then, the definitive constitution of the present company which determines the point of beginning of the ten years.

Besides, these different laws contained, for the benefit of the Colombian Government, the following advantages:

1. The receipt of 5,000,000 francs in paid-up shares of the new company.

This was effected by articles 5 and 6 of the by-laws.

2. The obligation of the liquidator and the new company to pay to the Government of Colombia without deduction, the sum of 8,000,000 in gold, payable as follows:

Five hundred thousand francs before the 31st of December last (1893). This sum was paid punctually by the liquidator.

And 7,500,000 francs surplus which remains at the charge of your company, in four payments, year after year, the first to be made three months after the definitive constitution of the new company. The first of these installments will be of 1,500,000 francs and the three others of 2,000,000 francs each.

3. The maintenance at the cost of the company of the armed force necessary for the preservation of order and the security of the canal.

4. Participation by the Colombian Government in the gross proceeds of the enterprise according to the terms above mentioned.

5. The right of the Government of Colombia to name, whenever it shall judge useful, a special delegate to the council of administration of the company, who shall enjoy the same rights as those given to the other administrators by the by-laws of the company.

6. The maintenance in the hands of the Colombian Government of the guarantee of 750,000 francs paid by the company in liquidation.

This guarantee is comprised in the contribution which is made to you by the company in liquidation.

Such is the general scheme of agreements of concession, which carries for the company serious charges, but which includes at the same time—with the long period of concession, with the granting of the soil of the canal and of its banks, and the right to 500,000 hectares of public land, with the monopoly of the transit, and of the conditions on which such transit is practicable—all the elements of a great enterprise.

## 2. WORKS, CONSTRUCTIONS, MATÉRIEL.

“The works executed, the plants, workshops, buildings, hospitals, matériel mounted and not mounted, materials and supplies, etc., belonging to the Universal Company of the Interoceanic Canal in liquidation, as well as all guaranties which may have been deposited by the said company in liquidation.”

As for the guaranties, this concerns the 750,000 francs paid over to the Colombian Government by the old company, and which that Government keeps in its hands, as we have above stated.

As to the remainder of this part of the contribution, it embraces in this enumeration all the work accomplished by the old company of the Interoceanic Canal during the eight years of its existence, from 1880 to 1888.

It would be rash, gentlemen, to undertake to appraise in an absolute manner the real worth of this asset.

We do not need for the accomplishment of our mission to enter upon the examination of the carrying on of the old company and we scrupulously abstain from expressing any opinions on that subject. It suffices to state, leaving out the question of expense, that the work accomplished by the old company represents a considerable part of the task in hand and that the matériel and the supplies can be made use of, at least for the greater part.

On this subject we find all the assurances necessary, in the reports of the commission of examination appointed by the first liquidator, M. Brunet, presided over by M. Guillemain, inspector-general of roads, bridges, and canals, of the 5th of March, 1890.

We place two extracts before you.

*Division II.*—Technical Report on the Canal with Locks, page 66:

“The execution of the works is entirely subject to the utilization of the matériel and the installations existing. It is with regard to these that the calculation of expenses has been made. Without departing from the exclusively technical character of this report, it is proper to give some information on this subject.

“The matériel on the Isthmus has an importance which the commission can not ignore. It embraces objects, the acquisition, the transporting, the mounting in place of which have cost 150,000,000.

“The delegation sent to the Isthmus has stated that the classification, putting in condition, the preservation of the divers implements neglected by the contractors on the embankments or at the bottom of ditches have

been methodically pursued since the suspension of the works. The workshops are in good condition, a perfect order reigns in the storehouses, and the matériel seen upon the plants has been cleaned with care and put into condition to resist the atmospheric influences.

"In the course of its movements the delegation had occasion to see, besides, the operation of several locomotives, steam launches, and divers apparatus, which operated well.

"On the other hand, it caused to be operated in its presence, upon only forty-eight hours' notice, two excavators and a dredge at Culebra, a marine dredge at La Boca, and several loading derricks. The experiments were satisfactory.

"There is, then, on the Isthmus a matériel of real value. However, the commission has not been able to reduce this value to figures, for it is purely conditional, almost nothing, if the works are not continued; on the contrary, it becomes very valuable for a new company, which will find in employing it the possibility of immediately starting the work.

"That which the commission believes that it can affirm is that, except perhaps some special machines, this matériel answers all requirements. Whatever methods may be adopted, the dredges of all kinds, the excavators, the loading derricks, the rails, locomotives, and earth cars are amply sufficient.

"The commission has not, accordingly, estimated in its calculation any new acquisition. The amount which it has given includes only the care and, upon occasion, the renewing of the implements by future constructors.

"The installations of the workshops are also ample. The three principal ones are at Colon, at Matachin, and La Boca. Some installations of less importance are scattered along the line. These establishments and the divers implements pertaining to them are more than sufficient to make all repairs of matériel necessary for active work.

"As to the dwellings for the personnel and the workmen, their number is enormous and seems even too great, since they permit to be lodged 26,000 to 27,000 workmen. Under this head there is no expense to be provided for.

"Thanks to the matériel and the installations which are found in place, the new company will be able, then, immediately to attack the hill at Culebra and to undertake the rest of the works without any other delay than that rendered necessary for the new studies and examinations upon the points which we have specially mentioned."

*Division I.—General Report, page 51:*

In that report the commission even examined the hypothesis of a contribution to a new company. It expressed itself in these terms:

"If one considers the contributions of the two parties in the contract to be made, he will find himself in the presence of a very complex situation. The new company contributes the capital for the first requirements, without which the work can not be accomplished. The loss will, then, be permanent, and its intervention, absolutely indispensable, creates for it preponderating rights. But, on the other hand, it can not

dispose of the matériel or the establishments of the old company. This latter, a fact not to be lost from sight, is still at present the sole concessionnaire. It has, as such, rights which are precisely those of the old subscribers, and it is not prudent for the latter to diminish their value, as some in these latter times seem to have undertaken the task of doing.

"These rights are very clearly established by the law of May 18, 1878. They will not be extinguished before 1899, if at that time the canal shall not be navigable, and therefore they constitute a privilege with, which it is necessary to reckon.

"Moreover, in that new country, where everything is to be created a new company will find it very difficult to get along without the concurrence of the old, without exposing itself in its turn to grave mistakes.

"The old company contributes its matériel, numerous establishments, its supplies, its lands which it has acquired with its money, those which are granted to it by the act of concession, and the works already executed.

"The matériel, the acquisition of which with its transportation and mounting have cost 150,000,000, is in good condition, although to some extent worn. In the opinion of the commission it will suffice, such as it is, for the construction of the canal if the method of carrying on the work is not changed, and will thus dispense with creating a new matériel.

"The fixed establishments, hospitals, lodgings, workshops, etc., are indispensable to a new company, as they were to the old. They cost 52,000,000.

"But, on the one hand, they no longer have their original intrinsic value. On the other hand, the old company has not free and complete possession of them, since in case of failure they remain, without having to be paid for, the property of Colombia.

"That is a condition which leaves them but a value for use—in some sort conditional—in the absence of a new arrangement between the interested parties, including the Government of Colombia.

"The lands received, or to be ultimately received, are likewise to return to Colombia if the canal is not completed within the time fixed. They are not, then, an assured property, but a conditional resource, which may become considerable, since the amount of land which will be granted to the canal in case of its accomplishment will be 500,000 hectares; but it is impossible to give figures as to this at a time when a crisis puts everything in doubt.

"As to the volume of excavations to be made use of, in view of the total excavations, the commission has not been able to give figures even approximately. The sea channels of the canal are in an advanced state, outlet ditches have been dug, the trenches have been attacked throughout to a greater or less depth, and, in fine, according to the statements furnished, the number of cubic meters removed has been nearly 56,000,000, which, taking account of the special expenses incurred by the company, have caused an expense of 489,000,000. But there have been false steps taken, it is said. An important part of the excavations undertaken with a view to the construction of the canal at sea level are

no longer of the same use to a canal with locks. Numerous accidents have taken place, as to which it is impossible to determine after the fact, the part to be attributed to improvidence and that which resulted from the natural condition of the country. Time finally has performed its work, and the soil, such as it is to-day, does not permit examination, which, in any case, would be very difficult even at the time when the events occurred.

"If we add here the uncertainties which proceed from the execution, due partly to great constructors, partly to employees, partly to the management, the complications produced by the rescissions of contract agreed upon, and which were carried out by the parties, it can be understood that the commission should restrict itself in the task, already very burdensome, and which it was to accomplish within the least possible time, of making an estimate as to what remains to be done.

"Finally, and to furnish data which should be considered simply as an intuitive estimate, the commission thinks that, taking account of the immense matériel in place and ready to be used, the numerous establishments created, the lands received and to be received, the work done, the experience acquired, the supplies and the plans prepared, as well as the concession itself, the contribution of the old company may be looked upon as the equivalent of one-half, at least, of the expense of 900,000,000 remaining to be laid out.

"It is true that this contribution has no real value except for a new company reorganized to profit by it, as the old one profited by it. It is reduced, on the contrary, to an insignificant value if the works are stopped, and this it is that renders the situation so difficult and so confused for the old subscribers."

This way of looking at things is similar to that of the Colombian Government, since in its dispatch of October, 26, 1888, the minister of finance expressed himself thus:

"Considering from the facts shown in the aforesaid *mémoire*, it results that the work performed for the construction of the interoceanic canal represents, at the present, more than the half of the work which the total construction of the canal implies, and that, consequently, the Universal Company of the said Interoceanic Canal has acquired the perfect right to have adjudged to it the one-half of the free lands mentioned in article 4 of the law of 1878."

And in this estimate the Colombian Government included, as did the commission, and even more than it, the false cost of the work, as is shown by the following passage of the dispatch of the 3d of January, 1884:

"That the representative of the canal company and its special delegate be informed that the executive power is agreed that this question, as all questions arising from the interpretation of the contract for the great work of the excavation of the canal, should be treated with the greatest elevation of views, looking rather to the spirit than the letter of the contract; that, consequently, the Government admits and considers as work done for the accomplishment of the canal, not only the quantity of earth removed, or the cubic meters cut for the opening of the said

canal (which conforms to the letter of the contract, but not to the good faith with which it ought to be carried out), but also the capital brought together to accomplish the undertaking, the technical and scientific studies for the laying out of the route and the execution of the work, the formation of the company, and the organization of the works, the transportation to the Isthmus of a great part of the machines and matériel of excavation, and the part already in fact constructed, and, after having taken all these into consideration, the executive power declares that the Panama Canal Company has the right to have adjudged to it, according to the terms of said article, 150,000 hectares as the equivalent of a little more than one-third of the execution of the work."

If the Colombian Government upon the report of its agents considered as one-third accomplished in 1884 the execution of the canal at sea level, the proportion which the commission adopts in 1890 for a canal with locks is not unreasonable.

There is less excavation to be done for a canal at sea level, but much more of masonry work.

Since 1886 great movements of earth have been effected, but on the one hand some of these were useless; on the other hand, the total cubic excavation is, by reason of the nature of the land, very much greater than was foreseen in the beginning, and it is not surprising that, all compensations made, the situation is a little less advanced, and is made worse, moreover, by the grave fact that time has passed and that the date of forfeiture is threateningly near.

As far as we are concerned we can not give our adhesion to the estimate of 450,000,000 which the committee of examination considers itself able to present, although under great reservations. We think it is not possible to advance a precise figure, which would necessarily be arbitrary. But we do not hesitate to think, and you will doubtless think with us, that the statements of the commission suffice to establish the conviction that this part of the contribution has, in any case, a value of such a nature as to justify the part of the profits which the liquidator of the old company has stipulated for.

As to the present state of the matériel and the works, we think we can accept with confidence the last report of the liquidator, dated the 21st of April, 1894. While it is true that that document emanates from the contributor himself, to whom we are the opposite parties, it is considered that he has presented it to the tribunal under his responsibility as judicial mandataire, rendering an account of his proceedings.

We read in that report:

"If it is observed that the works have been suspended for more than four years and a half, if it is considered, besides, the inevitable action of a climate such as that of the Isthmus, it is not astonishing that the plants and matériel have undergone some loss and deterioration. The effects of time and of the climate having been foreseen, the liquidator sought with great care to prevent them. He can affirm that, thanks to the measures which he caused to be taken, these effects have been relatively of little importance and can be easily remedied."

The report contains afterwards circumstantial details as to each sec-



tion of the works, and as to the different kinds of the matériel, which confirm these assertions.

As to what concerns the matériel properly so-called, a statement was drawn up in the course of the liquidation (Exhibit C to the report of the 12th of November, 1891), and has been communicated to your commissaires.

### 3. STUDIES AND DOCUMENTS.

"The plans, drawings, studies of all kinds in the hands of the Inter-oceanic Company and concerning in any way whatever the study, the execution, or the operation of the canal, or its accessories, as well as the benefits of all agreements with third persons."

It is useless to dwell upon this paragraph, which explains itself. Your company having the same end and object as the old company, all studies and documents brought together by your predecessors will contain useful information and facilitate your task, and throw light on your course in the future.

### 4. PANAMA RAILROAD.

"The rights of all kinds, shares of ownership or others whatsoever which may belong to the Universal Company of the Inter-oceanic Canal in liquidation as to the railroad from Panama to Colon."

The rights in question were comprised in the contribution of the liquidator in the same way as the other elements of that contribution, and should be examined in the same manner.

The special agreements on this subject which have been inserted in the by-laws, with the view to a particular event, will be discussed separately in the last paragraph of our work. This reservation made, let us examine their direct value.

The railroad belongs to a special anonymous company whose headquarters are at New York.

The rights of the liquidator represent  $\frac{1}{10}$  of the capital of that company. This capital is of \$7,000,000, which at the rate of exchange fixed of 5.20 per dollar is worth 36,400,000 francs; that is to say, for the  $\frac{1}{10}$  a sum at par of 3,637,680 francs. The 1,466 shares belonging to third persons, other than the liquidator, appear to give rise to very infrequent transactions and are not officially quoted on the stock exchange of New York. We do not definitely know what has been their market value. The sole information which we are able to give is the value of 175 francs or thereabouts, during the month of August last. Finally, we give the table of dividends since the origin of the company in hundreds of dollars:

Year.	Dollars.	Year.	Dollars.	Year.	Dollars.
1876.....	12	1882.....	12.50	1888.....	26
1877.....	12	1883.....	13.50	1889.....	9
1878.....	12	1884.....	16	1890.....	5
1879.....	13	1885.....	10	1891.....	5
1880.....	16	1886.....	Nothing.	1892.....	2
1881.....	34.26	1887.....	6	1893.....	Nothing.

Leaving out the period from 1881 to 1888, which was that of the activity of the old company, and which is consequently abnormal in all respects, the preceding table indicates clearly that the Panama Railroad gave from 1876 to 1880 a high revenue, varying from 12 to 16 per cent, whereas from 1889 to 1893 the revenue fell gradually from 9 per cent to zero.

The present situation of the railroad is not, therefore, favorable.

We should go beyond the object of our mission if we should enter upon details as to the causes of this condition of things and the means of remedying it. We shall have to limit ourselves to a few summary observations.

It appears that the present revenues of the railroad can be raised to a higher plane by the conclusion of new agreements with steamship companies. The liquidation has rightly made use of its influences to prevent the renewing of old agreements in order to leave complete liberty of action for the future. The development of the traffic can, besides, be favored by the improvement of the terminal facilities of the railroad at the two oceans. Finally, it is certain that the recommencing of the works on the Isthmus will give rise to considerable transportation, by which the railroad will profit. Your company itself will pay for a great part of that transportation.

But however that may be, and whatever the present money value of the railroad, and of whatever improvement the railroad and its future revenues are susceptible, the contribution which is made to you of the rights of the liquidation has advantages which we do not hesitate to call fundamental. Every enterprise for the cutting of the canal must necessarily reckon with the railroad company and has need of its aid. It is important, then, in the highest degree, to have a serious influence in it, and therefore it was necessary that the liquidation should transfer to you its rights.

You will find, by way of exhibit to this report, the last balance sheet to the Panama Railroad of December 31, 1893.

#### IV.

In return for this various contribution, of which we have undertaken to show you the outlines, the extent, and the different elements, what are the charges which the by-laws impose upon your company? And what are the advantages stipulated in favor of the liquidation of the old company?

In the first place, the liquidation imposes on the new company the executing of the divers financial obligations in favor of Colombia which result from the original contract of concession and the two laws of prorogation. We specified these above and do not need to return to them. These are the charges inherent in the very object of the enterprise and which ought to fall to you without any possible discussion, in our opinion, as a natural consequence of the substitution of your company to the old company.

Let us pass to those stipulated for the liquidator.

1. He has reserved the power to establish, up to the time of completed construction of the canal, a commission of examination and inspection whose remuneration shall be at the charge of your company. This commission of examination appears to us to be absolutely justified by the considerable interest which the liquidator preserves in the new company, and can be for your company, and for the stockholders, only a guaranty and a safeguard which they should be the first to welcome.

2. The preferential right to subscribe to half of the present money capital of 60,000,000 and the totality of future issues in case of increase of the capital has been reserved for the benefit of the stockholders and bondholders of the old company.

The right to subscribe to half of the present capital of this company has been exercised in part, and those who have made use of that privilege appear to-day among you. The other subscribers have given their adhesion with perfect knowledge of the right of preference as to the future increase of the capital. This agreement seems to us perfectly lawful; we do not think it requires any observation from us.

It is but another proof of the ties which will bind the new company to those interested in the old company, and the facilities which are accorded to them can not be other than favorably received.

3. Finally, and this, properly speaking, is the only advantage which results from the by-laws, the liquidator as such, has had accorded to him 60 per cent of the net profits of the enterprise.

The liquidation does not ask of the new capital any present sacrifice by way of immediate payment in money, by way of paid-up shares coming into equal consideration with the shares subscribed in money, in addition to the charges imposed by the Government of Colombia. It is only upon the development of the work and upon the profits to arise when once the canal is constructed and open to public use that the liquidation asks a participation, becoming thus your associate and accepting the risks of the enterprise in order to receive with you the hoped-for profits.

As to that proportion of 60 per cent, it is to be noted in the beginning that it is to be calculated on the net profits only, according to the terms of article 51; that is to say, after the payment of the following charges:

1. The participation stipulated in favor of the Colombian Government;

2. The general expenses of all kinds and the expenses growing out of bond issues;

3. The legal reserve fixed by the law;

4. The payment of 5 per cent of the company capital, in order to constitute a sinking fund, as also to serve as an interest on the shares of the capital stock; and

5. The remuneration at 5 per cent of the council of administration.

This concession of 60 per cent, with the deductions aforesaid, and which include, it is important to insist, the taking out of 5 per cent of

the company capital, present or future, in the way of interest or sinking fund, appears to us to correspond very exactly with the respective rights of the old and the new company. We consider it perfectly equitable.

We conclude, then, with recommending that you accept the contribution of the liquidator and approve the clauses and provisions concerning it.

## V.

It remains, however, to treat of a special and important question.

Up to the present we have discussed and commented upon the clauses and conditions of the contribution applicable from the constitution of your company, and which will be maintained if it succeeds in accomplishing the object of its constitution, and pursues the construction of the canal.

But on the side of that principal situation, which we hope, as you do, will be the only one to be dealt with, the by-laws have provided for a subsidiary hypothesis, that of your not being able to construct the canal, and for the event of that hypothesis being realized in spite of all efforts, there have been provided special agreements so far as concerns the rights of the liquidation as to the railroad from Panama to Colon.

We think we should, for greater clearness, reproduce here in bold type article 5, paragraph 4, and article 75 of the by-laws:

\* \* \* \* \*

These provisions are very clear.

Your company will have, from the day of its constitution, the ownership of the rights of the liquidator as to the Panama Railroad; it alone will have the enjoyment and exercise of them, and there is not imposed upon it at present any charge except those of which we have already given you an account.

Only, according to future events, the conditions under which the transmission of these rights is made to you may vary.

If, after the experimental period and the serious recommencing of the works, which will constitute the first phase of your company's existence, you find yourselves in a position to pursue the accomplishment of the canal, the contribution by M. Gautron as to the Panama Railroad will remain pure and simple. Your company will have nothing to pay to the liquidation and it will remain proprietor of the rights in question, except for the forfeiture, in case it should not carry out its engagements. If, on the contrary, when this phase shall reach its end, the necessary provision for the accomplishment of the canal shall not be made, we will still preserve the rights as to the Panama Railroad, but your company will have—

1. To pay to the liquidation an indemnity of 20,000,000 francs.

2. To give it one-half of its profits without subtraction other than those provided for in paragraphs 2 and 3 of article 51 of the by-laws.

We remark, in the beginning, that the part of the profits reserved to the liquidation in this subsidiary hypothesis differs considerably from

that which is assured to it in case the enterprise shall pursue its normal development.

In the latter case the part of the benefits is the 60 per cent of that which remains after the stockholders of your company have taken out, by way of interest or sinking fund, a sum equal to 5 per cent of the amount of the company's capital. In the subsidiary hypothesis the part of the liquidation is 50 per cent of the gross receipts, with the sole deduction of expenses of all kinds and the legal reserve, without any subtraction for interest and sinking fund. These special conditions are, then, much more onerous.

Are they equitable? That is what we have to determine.

We cannot pass over in silence the reasonings concerning the Panama Railroad contained in the judgment dated the 8th of August, 1894, by which the tribunal of the Seine has rejected the tierce oppositions directed against the approval of your by-laws.

"Considering, so far as concerns more especially the contribution of the rights as to the railroad from Panama to Colon, that it is an essential condition and basis of the new combination, not only on account of the necessary correlation of the two enterprises, but because it permits to be assured a legitimate remuneration to the capital of the new company, in case the accomplishment of the canal should be definitively abandoned; that it is important to note that the cession of these rights is only conditional; that they will return to the liquidation if the accomplishment of the canal, having been decided by the general meeting, it can not be terminated by the time fixed in the act of concession; that this forfeiture guarantees completely, on that hypothesis, the interest of the liquidation, and that no criticism can be, or is, directed against the by-laws under that head; that it is the same so far as concerns the contribution to the new company of the said rights in case of the completion of the canal; that the revenues of the railroad will add in that case to the products of the canal, and will benefit consequently the liquidation to which is conceded three-fifths of the profits of the undertaking; that if these rights are to remain the property of the new company, in case the general meeting should not take the steps necessary for the accomplishment of the canal, the liquidation will, on that hypothesis, not receive merely, as the tierce opposant seems to believe, an indemnity of 20,000,000 francs, but a half share of the profits; that the only deductions authorized in that case being those of the expense of maintenance and operation, expenses of administration and the taking out of a twentieth for a reserve, the share of the new company in the revenues of the railroad will not exceed what will be paid to the liquidation; that it will be the less to be feared that the company will renounce for such a small remuneration the accomplishment of the canal, with the purpose of confining itself to the operation of the Panama Railroad; because the works and annuities paid to the Colombian Government, added to the indemnity of 20,000,000 will have, at that moment, absorbed the totality of its cash capital in such a fashion that the company will have found that it has bought at nearly 80,000,000 the one-half of the revenue of the

railroad; that the apprehensions manifested by Couaillier are then without foundation; that the rights as to the Panama Railroad have, it is true, been bought by the Panama company for 93,000,000 francs, but it is shown that the price was very considerably raised by speculation, as also that the revenues of the railroad were artificially increased;

"That, if it is legitimate to expect in the future a remunerative revenue, it has none the less been demonstrated that the sale en bloc for 20,000,000 francs of the half of that revenue constitutes a transaction altogether to the advantage of the liquidation."

As you see, the tribunal has done justice both to the argument drawn from the purchase price of 93,000,000 francs by the old company, and all the other pretexts invoked by the opposants to make out that the liquidator has not required enough.

But your commissaires and your general meeting stand at a point of view absolutely opposite, and it is our business to-day to examine, on the other hand, whether the requirements of the liquidator have remained within reasonable limits.

It would not be so if, as the tribunal states, your company was exposed to the purchase, at nearly 80,000,000, of the half of the revenues of the railroad.

That sum can not be reached in any case, since your cash capital is 80,000,000.

On the other hand, one should not consider, as making part of the price of purchase of the rights to the railroad, the sums which your company proposes to expend to accomplish the construction of the canal. That is an enterprise the extent of which you should not deceive yourselves about.

The loss which you may incur should not enter into account after to-day in calculating the compensation representing a special part of the contribution of the liquidator.

What is true is that your company, in paying to the liquidator an indemnity of 20,000,000, while it will receive the one-half of the profits, is proceeding in reality on the footing of 40,000,000 for the railroad.

This should be the basis of our reasonings. After what we have stated above on the subject of the money value and the present condition of the railroad, the facts can not be dissembled that the ultimate conditions here are a little severe.

But the matter ought not to be looked upon as a cession pure and simple at a price debated and agreed upon. It is diminished by other considerations which we have already briefly indicated and shall develop.

Properly speaking, there is not a question of a price, but of an indemnity. The by-laws say that expressly.

This indemnity was stipulated by the liquidator for the case in which your company will not construct the canal. It has altogether the character of a penal clause, and it appears legitimate that the figure should be very high. Indeed, the stopping of your enterprise would expose the greater part of the assets which the liquidator has contributed to you to grave consequences.

The rights as to the Panama Railroad preserving on every hypothesis their value, it is proper that the liquidator has consented to transfer them to you only upon assuring an indemnity equal to the maximum value which they may have.

On the other hand, it is to your interest to consent to pay ultimately this indemnity, for the purpose of obtaining the certainty of preserving by definitive and irrevocable ownership the rights of the railroad, in case you may have difficulty as to the construction of the canal. We shall speak here only with a certain reserve of the state of affairs to which we have already made allusion, and which is very well known to all persons familiar with the matter of Panama. The railroad is an important factor of every great enterprise to be carried on upon the Isthmus. The ultimate destinies of every way of communication between the two oceans are bound up, at least in part, with those of the railroad. You will assure the future, whatever may happen, in obtaining as to the Panama Railroad a great influence. You will thus respond to the original idea which caused the formation of your company, and which consists in making all possible efforts in order that an enterprise which has already cost so much of French savings should not attain its conclusion except with their concurrence.

If these reasons seem to you well founded you will approve the special conditions of this paragraph, as well as the general conditions of the contribution of M. Gautron.

#### VI.

Article 52 attributes to the benefit of the council of administration 5 per cent of the net profits of the company before the division among the shareholders and the liquidator of the old company. It is equitable that the persons who will carry on the company shall have an interest in the results which it is to produce.

This provision is customary, and the amount adopted and inserted in your by-laws should be ratified by you.

#### VII.

In conclusion, gentlemen, we have exhibited to you, a little tediously, perhaps, all the points to which the commission which you have given us makes it our duty to call to your attention. We should depart from our rôle if we should discuss in this report the future of the enterprise to which you have given your support.

The past imposes upon us the greatest reserve. But we can say, what our profound examination has confirmed for us, that is, that your company is created under conditions of prudence, that it is surrounded by measures of inspection and control which we think will attract confidence and will permit it to pursue and accomplish the work of reconstruction in view of which it has been established.

We are unanimously of opinion that the provisions contained in the by-laws, and which establish on behalf of the Colombian Government,

of the liquidation, and of the future administrators particular advantages, ought to be approved by you.

Paris, October 8, 1894.

The three verifying commissioners:

ED. FOUGEU.

CH. GOUDCHAUX.

G. FOCKÉ.

*Panama Railroad Company. Balance sheet December 31, 1893.*

Assets.	Dollars.	Debts.	Dollars.
Cost of the road.....	10,215,320.73	Capital stock .....	7,000,000.00
Property on the Isthmus.....	263,616.74	Bonds, 7 per cent general	
Matériel .....	169,322.99	mortgage debt.....	4,000,000.00
Profits not yet received (es-		Bonds of indebtedness to	
timate in part).....	80,967.67	Colombia, 6 per cent.....	2,152,000.00
Accounts to be received .....	18,648.14	Funds to buy bonds.....	57,430.00
Sinking fund .....	1,436,189.22	Interest accumulated on	
Cash on hand in New York.....	177,051.32	those bonds .....	74,768.69
Cash on hand in London .....	22,888.24	Debts on the Isthmus not	
Cash on hand at the agency		presented.....	40,549.13
on the Isthmus.....	30,204.73	Coupons due .....	1,710.00
Due by agency on the Isth-		Dividends not claimed.....	149.00
mus .....	4,855.81	Due for employees who	
General European agents .....	2,094.35	have died or left .....	894.70
Interest upon funds on de-		Due to the Government of	
posit .....	1,306.94	Panama .....	18,750.00
Advance of indebtedness to		Due to the annexed com-	
the Republic of Colombia.....	2,152,000.00	panies.....	32,513.86
Bonds sterling, 7 per cent on		Accounts to be paid .....	2,441.24
the treasury of the gener-		Divers unpaid accounts .....	3,325.34
al mortgage indebted-		Surplus December 31, 1892 ..	1,717,554.65
ness .....	471,000.00	Addition to surplus for the	
Due by sinking fund.....	17,284.12	year 1893 .....	75,795.77
Advances to the company of			
the steamers of the Pana-			
ma Railroad .....	115,131.38		
	15,177,882.38		15,177,882.38
Surplus .....	1,793,350.42		

EXHIBIT N.

FIRST AND LAST REPORTS (1895, 1901) OF THE COUNCIL OF ADMINISTRATION OF THE NEW PANAMA CANAL COMPANY.

REPORT OF THE COUNCIL OF ADMINISTRATION TO THE ORDINARY GENERAL ASSEMBLY OF DECEMBER 21, 1895.

GENTLEMEN: You are met in ordinary general assembly to receive an explanation of the operations of the company during its first activity, the duration of which has been eight months and ten days, since the 21st of October, 1894, the date of its definitive constitution, and up to the 30th of June, 1895. You will have to pass upon the accounts involved in such operations and upon the proposition which we shall have the honor to submit to you.



## I.

It is proper to go over, in the beginning, the particular circumstances in which our company was formed.

By the terms of article 1 of the contract of prorogation of April 5, 1893, the termination of the Panama Canal concession was to ensue if a new company for its construction should not be formed before October 31, 1894, and "if the work of excavation was not undertaken in a serious and permanent manner before that date."

It is not without difficulty that the promoters of the new company have been able to attain their object within the necessary time. The subscription of the greater part of the capital resulted from proceedings whose validity was submitted to judicial sanction and legal delay. Thanks to the care and activity of the judicial officers, no unfavorable incident has occurred, and your company was able to validly constitute itself on the 21st of October, 1894, ten days before the expiration of the period referred to.

The uncertainty which existed up to the last moment, gentlemen, forbade either the contracting of any engagement in the name of the company in process of formation, or to take the steps which are ordinarily taken to assure from its commencement the operations of the future company. It was therefore necessary the day after its constitution to improvise all the elements of an organization, which it was impossible to prepare in advance, even as to matters the most indispensable.

But, thanks to the foresight of the promoters and the concurrence of the liquidator of the Universal Company, we have been able rapidly and with success to safeguard your interests in Colombia.

From the 22d of October the council of administration, by cablegram, accredited as its representative near the Colombian Government M. Mancini, formerly chargé d'affaires of the French Republic, who already exercised the same function for the liquidation of the old company. It charged him to officially notify the Government of Bogotá of the formation of the new company and to present the documents previously sent to our agent. At the same time the minister of foreign affairs of the French Republic was good enough, upon our application, to instruct the minister of France at Bogotá to make the same communication.

The 23d and 31st of October M. Marco F. Suarez, minister of foreign affairs for the Republic of Colombia, answered these notifications by dispatches, recognizing without reservation the constitution in due time of our company. These dispatches were inserted in the "Official Journal" of Bogotá, together with the complete text of our by-laws. On his part, M. Mallarino, minister of Colombia at Paris, gave us the most satisfactory assurances of the disposition of his Government.

The second condition imposed by the contract of prorogation—that is to say, the "taking up of the work of excavation in a serious and permanent manner"—has likewise been fulfilled in due time. A cablegram, announced in advance by instructions of the liquidator to the director of his business on the Isthmus, has permitted to be prepared

the reopening of the workshops and their being put into activity at the desired moment with a sufficient number of workmen.

The new company thus found itself in perfect conformity with the clauses of the documents of prorogation, and a new period of ten years for the execution of the canal commenced to run on the 22d of October, 1894.

We think well to add that we have had but to acquiesce under all circumstances as to our relations with the Colombian Government. The questions which the installation and carrying on of our operations on the Isthmus have given rise to, have been settled in a spirit of lofty equity, and to our satisfaction. We confidently expect to find always the same justice and the same good will from the Colombian Government which marks the close of the difficulties of the task we have undertaken, and will certainly aid us to surmount them in the interest of the future of Colombia, and to develop the commerce of the world.

## II.

One of the constitutive elements of the contribution made by the liquidator of the old company of the interoceanic canal to our company was represented by 68,534 shares of "Panama Railroad," which have been transmitted to us with the reservations and conditions embodied on that subject in our by-laws.

The situation of this matter, generally little understood, was far from being satisfactory when our company was formed. We think that to give you the data to understand it properly it will not be useless to go over here the general points of its constitution and the principal phases of its development.

We do not need to return to the principal considerations which have been the motive for the contribution of these shares to our company. They have been communicated in the report of the commissaires to your second general constitutive meeting, which explains the natural correlations existing between the two enterprises.

Created in 1849, under the form of an anonymous company, by virtue of a charter delivered by the State of New York for the purpose of favoring and facilitating the commerce of the United States at a time when there existed no railroad connecting the coasts of the Atlantic and Pacific, "the Panama Railroad Company" had for its object the operation of a railroad of 76 kilometers, which has opened to international commerce the Panama route.

The concession granted to the company in the beginning by the Republic of New Granada was confirmed later by the Colombian Government. By the terms of its by-laws it is administered by a council which sits in New York. It finds itself, by virtue of its constitution and treaties, placed, as does the way across the Isthmus, under the rule and protection of the laws of the United States.

Outside of its stock capital, which is \$7,000,000 divided into 70,000 shares of \$100 each, "the Panama Railroad Company" has issued two sets of bonds, the interest on which has required for the last year the

sum of \$369,000, the bonds in circulation, representing on the 31st of December, 1894, a capital of \$4,569,000, after deducting bonds paid, bought in, or remaining in the hands of the company.

One of these bond issues, which is at 7 per cent interest, and which has not been paid, is protected by a general mortgage on the immovable property of the company. Sufficient provision has not been made to assure the reimbursement which falls due for the whole on the 10th of October, 1897.

The other issue is at 6 per cent, redeemable in twenty-eight years, from 1881 to 1908, by annual payments which the operation of the road provides for with regularity. The carrying on of the railroad from Colon to Panama, commenced in 1855, has produced, from the beginning, brilliant results, and the period elapsing up to 1869 was very prosperous.

The opening of the first transcontinental lines modified these general conditions of traffic by the Isthmus. It has resulted in greatly reducing the rate of transport by the Panama Railroad, and to impel that company to seek the alliance and concurrence of companies operating vessels on the Atlantic as well as on the Pacific.

It was thus that in 1872, 1875, and 1878 arrangements took place between the Panama Railroad and the Pacific Mail Steamship Company, with the effect of regulating the conditions of traffic by the Isthmus. To understand from the point of view of transportation, the results of the régime inaugurated in 1872 in the operation of that railroad, it is proper to omit the period from 1881 to 1889, which was favored by the exceptional amount of travelers and merchandises during the works of the old company of the Interoceanic Canal. It appears that, omitting that abnormal element, the traffic of the railroad doubled during the period of twenty years which followed 1872, without the annual amount of receipts of transportation having been perceptibly increased.

We shall give to the carrying on of the railroad its true character by relating here that during that period of twenty years the expenses of operation following the development of traffic, increased disproportionately. The consequence was the obvious diminution of the profits of carrying on the road from the commencement to the end of that period.

In the first months of 1893 the last agreement concluded with the Pacific Mail ended without its having been possible to renew it before its expiration, upon acceptable conditions. The Pacific Mail then ceased carrying on the maritime part of the business upon a common tariff of rates. More than that, it claimed that the agreement of 1872 allowed it certain privileges without reciprocity as to traffic between Panama and Acapulco, and it introduced upon that subject a proceeding before the tribunal of New York. The rupture of relations with the ship company, which had assured up to that time the regular service of the route by the Isthmus between the coasts of the United States on the Atlantic and the Pacific, imposed upon the Panama Railroad Company the obligation to maintain a line of vessels on each of the two oceans from New York to Colon and from Panama to San Francisco.

The carrying on of the two lines by sea in connection with the railroad has been maintained with a loss. However, the organization of these maritime services has permitted the company to preserve practically the amount of traffic of the railroad before the reductions of rates which it has been compelled to make, produced an important diminution in its receipts.

In conclusion, the last two periods of operation of 1893 and 1894 have been much the most unfavorable since the beginning. The carrying on of the railroad during those two periods has left, according to the accounts of the company, an excess of receipts of \$298,885, after payment of all its expenses, including interest on the bonds. But this excess of receipts has been employed wholly to cover the losses arising from the two lines of vessels, the amount of which has risen to a total practically equal to that.

The negotiations undertaken and broken off at different times during three years with the Pacific Mail Company have continued during 1895. They have been conducted by the council of administration of the Panama Railroad with a persevering ability to which we are glad to render homage. A telegram, dated the 16th of the present month, has informed us that these laborious negotiations are about to result in the signing of an agreement. This happy solution, which will carry with it the suppression of the maritime service which the company has organized on the Pacific, will improve the general results of its operation.

In the course of those negotiations the operations of 1895 have proceeded under always difficult conditions. However, thanks to an abundant crop of coffee in Central America and to other favorable circumstances, the movement of the receipts of the traffic of the railroad for the three first quarters of the current year is sensibly increased, compared with the corresponding figures of the preceding year. On the other hand, the measures taken by the council of administration of the Panama Railroad with a view to diminishing expenses have already produced salutary results.

It is not permitted to us to state the ultimate result of the operations of the current year, the accounts of which can not be communicated to us before next March. There is, however, reason to think that, notwithstanding the sacrifices required by the maintenance of the two lines of vessels, the results of the operation of the railroad in 1895 will be more satisfactory than those of the operations of the two previous years.

But in the meantime the Panama Railroad Company is required to reserve all its financial ability and put itself in a condition to meet the falling due of bonds in 1897. It can not think then of executing with its own resources, nor by an appeal for a loan, the work required on the Pacific for an improved port. As has been said to you by the commissaire having to do with the contributions, the enterprise of the construction of the canal can not be indifferent to the proper carrying on of the railroad company. More than that, our constant care is to attract the commercial currents to the Panama route in order to assure for the canal, from its opening to navigation, an immediate traffic. We

consider it then indispensable to lend our aid to the Panama Railroad to remedy the grave defects of the railroad, even if for that it is necessary to make an advance of funds to a limited extent.

In the present state of affairs the lack of constructions renders the port of Panama altogether insufficient. The shallowness of the water prevents reaching the wharves of the Panama Railroad. Ships are obliged to cast anchor several kilometers from shore, under the protection of the Naos Islands, and the cargoes, on arriving or departing, are laden, unladen, and transported on lighter. These operations are tedious, costly, and seldom sure. There result losses of time to the vessels, risks of loss of the merchandise, and finally a double handling, which adds to the charge of transportation by way of the Isthmus. The council of administration of the Panama Railroad Company is probably occupied in trying to remedy these conditions, so unfavorable from the point of view of the development of traffic. To that end it has proceeded to examinations having in view the creation of a port at La Boca, at the point where the canal opens on the Pacific and which is already connected with Panama by a branch railroad established by the Old Panama Canal Company. The execution of this project will permit ships to discharge themselves directly opposite the railroad.

The expenses for this purpose is calculated at about 5,000,000 francs.

The examination of the ways and means to be employed for assuring the execution of that project has led the Panama Railroad to ask us to lend it, in some manner to be determined, the sum of 5,000,000 francs, representing the amount of the aforesaid expenses. We consider that it is in conformity with your interest to make the advance in question on certain conditions, and if possible with special guarantees. Consequently we shall ask you to give by particular resolution the authorization necessary for that purpose.

### III.

We take up now, gentlemen, the principal object of your company, which is the construction of the Panama Canal.

We are going to set before you as completely as is possible to us the progress of our examinations, and of our operations on the Isthmus, the results obtained up to June 30, and the hopes they permit us to conceive of the future of the enterprise.

We have taken possession of a domain of 14,000 to 15,000 hectares, that is:

- (1) A strip of 200 meters wide on each side of the canal, granted from the public lands by the law of concession of the 18th of May, 1878;

- (2) Lands of Christopher Columbus, conquered from the sea by different private owners, acquired by the old company, and of which a large part has the character of private ownership and can be disposed of.

Since the cessation of the works numerous occupants have established themselves on these lands and have cleared a part. By the terms of article 3 of the contract of prorogation of December 28, 1890, the Colombian Government has obliged itself to lend its active aid to put an

end to these usurpations. Our agents have given all their energy to the accomplishment of this difficult task, endeavoring to avoid, as far as possible, litigation.

On the 30th of June 800 affairs of this kind were already settled. This work proceeds in a satisfactory manner.

#### IV.

The immovable constructed properties existing on the Isthmus are very numerous. They consist of buildings for bureaux, workshops and storehouses, hospitals, dwelling houses for the agents, barracks and camps for the workmen, together with quite a large number of constructions not devoted to the business of the enterprise, susceptible of being rented and constituting, as does a portion of the lands, a private and dispensable property.

The condition of preservation of these different constructions varies. It nevertheless can be considered as certain that at nearly all points along the canal the construction is in a good state of preservation, susceptible of being repaired at little expense, and sufficiently ample to accommodate the personnel, administrative and technical, as well as the workmen, even in the periods of most activity of the works. The making of new constructions will be necessary only at a small number of places where the works not provided for by the old company may require them.

The distribution of drinkable water, of the greatest importance from a hygienic point of view, proceeds wherever it is necessary. It will be easy to provide, when necessary, for any new requirements in that respect.

The houses not used in connection with the works, especially at Colon, are rented, and produce a revenue which diminishes our expenses of caring for our property, and are, besides, moderate.

#### V.

We have also taken possession of the matériel accumulated on the Isthmus at great expense, which constitutes an inseparable accessory of the concession. The liquidation perfectly understood the necessity of preserving this portion of its assets, which, while without realizable commercial value, must facilitate greatly the recommencement of the works. It took care to collect the scattered objects at the workshops and to classify them.

Without speaking of the workshops for repair, well made and on an extensive plan, the following table will give you an idea of the matériel of the working apparatus:

Marine and river dredges.....	35
Lighters and steam launches .....	26
Boats with valve appliances .....	40
Excavators of different kinds.....	88
Locomotives of gauge of 1.52 meters .....	253
Railway cars of gauge of 1.52 meters .....	6, 006

Kilometers of track of gauge 1.52 meters.....	500
Locomotives, narrow gauge.....	14
Small cars (Decauville) .....	7,449
Kilometers of road (Decauville) .....	110
Locomobiles .....	169
Steam and hand windlasses.....	254
Skiffs .....	44
Derricks .....	278
Flatboats .....	81

With some exceptions, the number of these machines appears to be sufficient for the construction of the canal. There will be, then, to buy only a certain number of machines and tools which the old company did not have and the employment of which will produce an economy in the execution of the works. The materiel in general has been and continues to be well cared for.

## VI.

You will understand, gentlemen, that we would not have undertaken the difficult task which has been confided to us if we had not been previously assured by the opinion of a very honorable engineer, and one of unquestionable ability, that the accomplishment of the canal was not beyond the strength and devotion of men firmly resolved to undertake that great work.

From the month of August, 1894, the promoters of the new undertaking had applied to M. de la Tournerie, inspector-general, who had acquired, as president of the general council of roads and bridges, an exceptional experience of large works.

He made his reply after a profound examination of the business. After a complete study of all the documents of which he could possess himself, he is convinced that the accomplishment of the canal can be effected in the first days of October, 1894, and he accepted in principle the presidency of the technical committee provided by article 31 of the by-laws.

Immediately after the constitution of your company, M. de la Tournerie entered upon his duties, and we have occupied ourselves in forming a personnel of engineers and constructors to send to the Isthmus. The memories of the past have rendered this recruiting difficult, and time was necessary to prepare instructions and establish a perfect understanding with the engineers. They embarked at St. Nazaire on the 9th of December, 1894, and arrived at Colon the 30th of the same month.

Up to that date the continuation of the works on behalf of the new company had been assured by the personnel of the liquidation of the old company.

The transfer of the business took place on the 7th of January, 1895, without any difficulty, and conformably to instructions arranged between the liquidator and our company.

The president of the technical committee went to the Isthmus, accompanied by the administrator of the company, in order to settle by per-

sonal inspection their own views and to complete the instructions given to the local personnel.

After having left the Isthmus, and in order to make use of all means of information, these gentlemen made a visit to examine the canal in course of construction from Chicago to the Mississippi, some maritime canals from Amsterdam to the sea, from the Baltic to the North Sea, and from Liverpool to Manchester.

The preliminary studies and experiments which we have mentioned have permitted the president of the technical committee to map out the outlines of the enterprise.

## VII.

We do not need to remind you, gentlemen, that the construction of a canal at sea level seems to be out of the question. The experience, so dearly purchased, has demonstrated that such a work would entail an excessive expense and require a considerable lapse of time. Everyone appears to be in accord at present in this respect.

There is no question, then, as to a canal with locks.

This being so, there have been numerous projects. The first was prepared by the old company at the time when it was compelled to renounce its original conception of a sea-level canal.

Another project was elaborated by the commission instituted by M. Brunet, liquidator, under the presidency of M. Guillemain, inspector-general of roads and bridges. The question was taken up again by a great number of engineers, who have submitted useful ideas and proposed ingenious solutions of such and such particular problems. We shall owe much to the works of our predecessors. But investigations were necessary to determine the details, and have required long and minute studies upon the site. The commission presided over by M. Guillemain recognized this formally so far as it concerned it, and we can, without temerity, we think, extend this declaration to the other projects whose authors have not been able to consecrate to such difficult studies the time and money necessary.

The two principal difficulties that the execution of the canal presents are the cut of Culebra and the management of the waters of the Chagres. To-day the majority of technical men consider that these difficulties should be overcome in the following manner:

The valley of the river will be dammed at suitable points selected, in order to restrain the waters in such a manner as to form one or several lakes. As a result, the diggings to be made will be much diminished, since on a great part of the course, in place of being obliged to cut a trench, navigable lakes will be created. These lakes will constitute at the same time immense reservoirs, so that the floods of the Chagres will be received without danger to navigation and for the canal. The Chagres will cease in this way to be a menace, but will, on the contrary, be a valuable auxiliary. Finally, the cuttings will be nearly reduced to the cut of Emperador and that of Culebra, the length of



which will be again diminished as a result of the rising of the plain of water in the basin.

Thence will result the necessity of changing the present line of the Panama Railroad according to a new line to be determined according to the exigencies of the inundations.

On the other hand, the examination of the great maritime canals constructed in these latter times and the conditions of carrying them on demonstrates that for the security and facility of navigation it is indispensable—

To open, from the beginning, the basin at the locks into two water courses;

To construct locks with two basins, one of them having dimensions sufficient to receive the great ships, the types of which have singularly increased in these latter times.

As to supplying the higher water course, several plans have been proposed. The question has not yet been definitively settled, but we think we should say to you that it seems to us very desirable to supply it by means of mechanical appliances.

#### VIII.

As you see, our company finds itself in the presence of new problems, important to be settled. In perfect accord with M. de la Tournerie, we have thought it was not necessary to live in uncertainty or in obscurity as to the different solutions possible. It is for this reason that the Isthmus has been covered by a vast number of operations on the land destined to furnish all the information necessary to examine with full knowledge the numerous questions which have to be settled.

Under these conditions only can take place the deliberations of the technical committee, to which will belong, according to article 31 of our by-laws, the elaboration of a definitive project.

We should have seriously neglected our duty if, giving way to natural impatience, we had shortened the period of preparation and of study.

The want of success of the efforts of our predecessors has cast upon the works doubts which can not be dissipated except on condition of presenting to the public a project deliberately conceived, studied with scrupulous care, kept within the limits of moderate expense, and answering, nevertheless, the requirements of traffic.

It would be an error to believe that one could find in a hasty and precipitate development of the works a means of immediately restoring confidence.

The period of execution will be all the more short, the progress of the works all the more exempt from hesitations, and all false steps or expenses, including the interest, will be the less, the more the studies shall have been made profound and complete.

Outside of this line of conduct, rigorous and methodical, it would not be possible to assign a limit to the expense.

These studies have been conducted with diligence and with the greatest care by the personnel charged with them on the Isthmus; the data

and the results which they have brought to us have been successively put into practice. They are at present very much advanced, and this essential part of the task approaches its termination.

## IX.

At the same time that the studies were pursued without intermission, we have taken up and developed with all the activity possible the works commenced in the great cut of the passage of the Cordillera, which must be made, whatever project may be definitively adopted.

But before attacking vigorously the excavations it was necessary to make solid the unsafe masses on the left crest of the cut; otherwise grave accidents would be feared.

In the second place, it was not possible to develop immediately upon the whole length of the cut the works of Emperador and Culebra, because there is encountered in both cases special difficulties which a study of the whole and of the special establishments for excavation can alone settle surely and economically.

To-day, thanks to the protective works, we consider the danger of landslides avoided, and a tentative study, taking into account the experience acquired and the matters to be provided for, has permitted to be arranged a mode of work which warrants us in counting upon the rapid and sure excavation of a large cubic quantity.

Finally, it was essential, under pain of proceeding infallibly to an irremediable check of the enterprise on account of the great cost, to regulate from the beginning the conduct of the works in a manner to maintain salaries at a reasonable rate.

We have embarked successfully during some weeks all the workmen who had presented themselves. While we took the precaution not to create needs in addition to those of the employment of the labor obtainable on the Isthmus, we had, however, in the month of April, a first embarrassment in that respect. We recognized that our price paid was a little low. We kept it very low in the beginning for the purpose of destroying the illusion of those who looked for a return of the extravagance of the past. We have, accordingly, consented to raise slightly the price for our work. In the month of August a new mishap occurred. The company, convinced that the salaries were sufficient, resisted, and the workmen returned to the plants on the same conditions as before. These facts demonstrated that it would have been dangerous to give to the workmen at the start a too active impulse. The price of day labor would have been too much raised and the total expense seriously increased.

We believe, then, that we acted wisely in proceeding at the beginning with circumspection and not in developing our plans except a little at a time and in a methodical way, without endeavoring to make immediately and regardless of price a large cubic excavation.

We have thus reached the point gradually of employing 2,000 workers. To augment this number we have undertaken to get workmen from certain of the Antilles, but the local authorities have thrown obstacles

in the way of emigration. This incident has a little retarded our recruiting in requiring us to seek elsewhere. Four hundred new workmen have arrived at Colon. Six hundred others are expected, and the effective force is thus raised to 3,000 men.

With this personnel of workmen we intend to vigorously continue the works at the cut of Emperador and that at Culebra. A first trench or ditch, the lower part of which will be 15 meters wide, will be carried down to 4 meters below the plane of water in the water course at those places. It belongs to the technical committee to determine upon this plane, which does not permit us as yet to estimate exactly the time for the digging of the ditch.

This ditch will differ from the final trench only by its less width and by a very slight difference in its depth. When it is terminated, the possibility of completing the canal, one of the difficulties of which consisted in crossing the Culebra, will no longer be doubtful to anyone.

#### X.

The sanitary administration has been the object of our constant solicitude. We have considered that nothing should cause a neglect in assuring to the personnel the best hygienic conditions possible and the care necessary in case of accident or sickness.

The sanitary condition has this year been very satisfactory; the number of sick has remained below all expectations. Of the two hospitals possessed by the company we have been able to close that at Colon, and we have kept that of Panama, which is more than sufficient at present for the needs of the service.

During the month of June, which is, from a sanitary point of view, one of the worst of the year, the number of sick in the hospital did not reach 2 per cent of our effective force.

It seems, besides, that the salubrity of the country has considerably increased during some years. It is possible that this improvement is due to the clearing and cultivation which have taken place since the cessation of the works of the old company.

#### XI.

In the course of the explanation which we have given you as to the plants and the works we have sufficiently manifested our opinion as to the important rôle which belongs to the technical committee. Such is, we think, the true interpretation of article 31 of the by-laws. Also, we have not ceased to occupy ourselves in the formation of that committee.

We have thought that, to facilitate, when the time should come, the appeal which we will have to address to French and foreign capital, this committee ought to have an international character, and the French members should be selected in a broad-minded way; that is to say, at the same time among the engineers of state and among the civil engineers.

The deference due to the Government has induced us to solicit, before

everything else, authorization to apply to the engineers of roads and bridges in active service.

Our request was made in July last. We have since then repeated it several times, but by dispatch dated the 29th of November last the minister of public works informs us that he regrets not being able to give us that authorization.

We have since commenced to take steps, from which we thought it our duty to abstain up to this time, in connection with some eminent personages, French and foreign, and we expect that the technical committee will be shortly constituted.

## XII.

We have now, gentlemen, to state summarily recent incidents to which the project of the Nicaragua Canal has given rise.

As you know, an interoceanic communication by Nicaragua has been under examination for a long time, and even during the period in which the work of the old Universal Company was in the greatest activity, divers attempts were made without success, to recommend that enterprise to the public authorities of the United States.

A new effort is being made with the same end in view.

In the month of January, 1895, the Senate of the United States voted a bill tending to constitute a company which would enjoy a guaranty or interest given by the Federal Government and would be placed under its control.

This bill was not accepted by the Chamber of Representatives, which, however, voted at the end of its session a credit of \$20,000 for an examination of the project by an official commission.

The report of the commission has been made. We do not possess its text, but, according to analyses published in American papers, it will recommend the postponement of the matter. The opinion of the commissioners will be that the probable expense would rise to about double the figure contemplated by the promoters of the affair, and in view of the gravity of the difficulties to be overcome it will be necessary to proceed to new investigations, which would require at least eighteen months and entail an expense of \$350,000, or nearly 1,800,000 francs.

It is not for us to predetermine the decision which will be taken on the subject of this affair by the United States. We have confidence that that great nation will understand that the universal character of the work of Panama can not fail to give all security to the commercial and political interests of the American people, the sympathies of whom we make it our business to cultivate, as we do those of all the maritime nations.

## XIII.

We have nothing to add to the detailed explanations given by you by the commissaires of accounts on the balance sheet of June 30, 1895, printed at the end of the present report.

We may mention that the commission of examination, instituted by

the liquidator of the Universal Company, in accordance with the provisions of article 5 of the by-laws, has proceeded to have its credentials verified. We have gladly placed ourselves at its disposition to facilitate the accomplishment of its mission.

#### XIV.

By the terms of article 22 of the by-laws, the council of administration renews itself to the extent of one-third every two years, when its members are of the number of 9, 12, or 15; and in case the number of administrators in activity is not exactly divisible by 3, it belongs to the general assembly to arrange the matter.

Your council is at present composed of ten administrators. We propose to you to decide that four of them instead of three shall be selected by lot before your next annual meeting, which will have to vote as to their being replaced or their reelection.

#### XV.

It has appeared to us natural and desirable that the bondholders of the old company, interested like you in the accomplishment of the canal, should be represented in your council of administration, and the constitutive meeting of the 20th of October, 1894, has taken action inviting us to submit a proposition to that end.

We have particularly considered that point, but we have speedily recognized the difficulty of proposing to your choice such and such an individual selected among the old company bondholders, without raising delicate personal questions.

It is for the bondholders themselves to agree upon the designation of their candidates; but the number of persons interested in the old company is too great for that to be possible, and the candidates presented by a group would never be more than those of a minority.

We have accordingly thought best to address ourselves to M. Lemarquis, who is, by virtue of his legal commission, the representative of all the bondholders without exception.

This honorable mandataire of justice, approached on this subject, has responded that he was ready to join his efforts with ours for the accomplishment of the canal. But he has observed to us that, if the accomplishment of that great work created numerous interests common to the stockholders of the new company and his principals, the bondholders, he considered that, in order to represent the latter in your council with independence, he could not accept the post of mandataire of the stockholders.

We have recognized those obligations as well founded, and in order to respond to the desire expressed by the general assembly of October 20, 1894, we propose to you to authorize your council by special resolution to join with itself M. Lemarquis, judicial mandataire of the bondholders, to have the right to take part in all the sessions of the council of administration with a consultative voice, and to propose there any measures which he may judge proper.

We can also delegate to him, by application of article 29 of our by-

laws, and when we think it for the interest of our company, the whole or part of our powers, with the object of utilizing in an effective manner the concurrence which he has consented to give us.

## XVI.

We have endeavored, gentlemen, to present to you an explanation as clear and complete as possible of the progress of your affairs.

You know under what specially difficult circumstances your company was created, and how we were called upon to undertake the work of reconstituting the business of the Panama Canal. We had at the beginning everything to do to assure its being carried on, and everything to learn to discover the truth in the midst of the contradictory and sometimes impassioned views to which it has in the past given rise.

We have not thought proper to act at all after forming an opinion conscientious and reasonable concerning facts, a great number of which were little understood or badly interpreted.

We find the Panama Railroad in a delicate situation. The agreement to be signed will improve the circumstances of its operation, and the establishment of maritime installations at Panama, which depend only upon your vote, will contribute to the development of the traffic.

During the short duration of an administration of eight months we have assured the rights resulting from the acts of concession on the point of escaping from the liquidation of the old company. We have taken possession of the lands, immovable properties, the matériel, and the works existing on the Isthmus, as well as the other parts of the contribution. We have looked after the recruiting of the personnel, and organized the activities of the new company. We have taken up again the works of the canal, and have given to them a methodical impulse which belongs to the conducting of a great enterprise. By examinations, pursued with care, we have disengaged the general lines of the solution to be adopted, and prepared the elements to be submitted to the deliberations of the technical committee in conformity with article 31 of our by-laws, to arrange the definitive project of a navigable way susceptible of great traffic. If we do not encounter one of those difficulties which defies human foresight, the great trench of Culebra will be greatly lowered, and will furnish the demonstration that the confident hopes of the promoters and the stockholders of your company may become a reality.

We are reaching the end of a period of examination and organization of plants which appeared to us to be the indispensable condition of success. We are now at the point of vigorously attacking the works.

Strong in your support and your confidence, we are resolved to pursue the construction of the canal with all the energy of which we are capable.

REPORT OF THE COUNCIL OF ADMINISTRATION OF THE NEW PANAMA CANAL COMPANY OF DECEMBER 21, 1901.

GENTLEMEN: You have met in ordinary general meeting, in conformity with article 36 of the by-laws.

Since your last meeting we have pursued regularly the continuation of

the works, notwithstanding the trouble caused on the Isthmus by the political situation and the revolutionary crisis. As in the past, our efforts have been concentrated upon the excavation of the great central trench, and especially upon that part of it at Culebra.

The cubic quantity taken out during the year is 1,080,000 meters, which carries the total cube excavated since the recommencement of the work by the new company to 5,850,000 meters for the entire trench. The depth of the trench is lowered by this to an altitude of about 45 meters above sea level in the culminating part of the trench. We are excavating now on a large scale according to a methodical working organization, with a view to the final section. The Panama Railroad Company has reported definitely upon its proceedings as to the partial deviation of its road between the stations of Culebra and Pedro-Miguel, a deviation which we have effected to permit us to get rid of the part of the railroad that crossed the trench at the exit from the Culebra hill, and which constituted an obstacle to the work of excavation.

As we made known last year, we are continuing in a regular manner our hydrological observations, which are of serious interest for the solution of problems concerning the discharges of the Chagres and its affluents, both at low water and during floods.

The sanitary condition of our personnel is as satisfactory as possible. In a personnel of agents and workmen of about 2,000 men, we have to deplore only 50 deaths, of which 44 were from causes existing in all countries, or from accidents incident to the work; 6 only were due to maladies of the climate.

The business of 1900-1901 has been particularly marked by our relations with the Government of the United States. We come now to the part of our report which has to do with those relations. We limit ourselves to presenting to you an account of them necessarily condensed, but clear and precise.

You know already that we have accepted the principle of a cession to the Government of the United States of our concession and of all our properties on the Isthmus.

In execution of a law voted by the Congress on March 3, 1899, the President of the United States has appointed a special Commission charged with examining, in all its aspects, the question of the construction of an interoceanic canal by one or another of divers routes which may present themselves.

You are not ignorant that by reason of the formal prohibition stipulated in article 21 of our law of concession we can not take any effective action in the way of a sale to the Government of the United States without the authorization of the Colombian Government. Through its minister plenipotentiary and envoy extraordinary at Washington, M. Martinez Silva, the Colombian Government acquainted us, on the 28th of March, 1901, with its intention to give to "the canal company authority to transfer its concession to the Government of the United States, upon certain conditions concerning the two Governments."

This intervention took away the prohibition decreed by the law of

concession and gave us the power to enter upon negotiations with the Government of the United States without compromising ourselves.

With a view to the carrying on of those negotiations and to furnish for them a rational basis, we have made with the greatest care an estimate of our properties of all kinds on the Isthmus—concession, matériel, constructions, works, rights as to the railroad, etc. This important work divides itself into articles which, all together, represent a considerable sum.

In transmitting to the president of the Isthmian Canal Commission (that is the name of the Commission above mentioned), M. Hutin, president of the company, undertook to specify the nature of this work. He said especially in his letter dated October 4, 1901:

“I desire to add, Mr. President, that these are simply sums to which we are led by a personal valuing which we are making of the different elements, to be discussed pro and con in the negotiations, and which, from the very fact of those negotiations between independent parties, can be modified to an extent more or less important. This is, then, properly speaking, that first expression of the views of the company to which you allude in your letter of May 16 last as intended to serve as a basis for discussion, as concerns us, in the proposed negotiations—negotiations which we shall undertake, believe me, with the greatest desire to reach a reasonable agreement. We are prepared to carry to them, with that end, a sincere spirit of conciliation and of concession, hoping that we will find on the other side the same spirit and the same desire to reconcile, in an equitable manner, the serious interests before us.”

These statements seemed of a sort to prevent all misconceptions. There has occurred, nevertheless, an incident of which we shall give an account.

The final report of the Isthmian Canal Commission was made to the President of the United States at the end of last month. According to the findings of that report the Commission declares itself in favor of the Nicaragua route, after having, however, set forth faithfully the numerous advantages of the Panama route. That decision is based principally upon this consideration, that the price fixed by the Panama Canal Company is so high that the Commission can not recommend its acceptance.

We believe that there is here only a misconception, for the company has never intended to fix a price, but only to offer a basis for discussion. The communications previously received permitted it, besides, to count upon the Commission's lending itself to that discussion. But the Commission has considered that its authorization did not extend to negotiating, and it has made its report, stating therein as the price demanded by the company the total of the valuations.

However this may be, it is important to correct without delay that error. It seemed to us that the report of the Commission furnished a means of arriving at that end in a manner such as to leave no room for doubt.

Among other advantages of the Panama route over that of Nicaragua the report of the Commission makes prominent a decided economy in



the cost of construction and an annual economy in the expenses of operation. Here, then, is, outside of the technical advantages, a motive of preference in favor of the Panama Canal.

We shall ask you at once to give us all powers to treat with the Government of the United States under the reservation of submitting to your vote of approval the sum settled upon by the Government of the United States and the agent charged by us to carry on the negotiations. But, from the present, we desire to inform you that our negotiator will receive instructions to declare to the American Government that we are ready to make omissions from the valuations which have been considered as a fixed and determined price from that point of view inadmissible, and that we shall offer to take for the basis and point of starting for the debate which we ask for and which it will not decline, as we believe, the figures and statements contained in the findings of the final report of the Isthmian Canal Commission. We shall give, besides, to our agent the power to close the discussion upon proposing a fixed price.

Under these circumstances it seems to us that nothing equivocal can exist as to our attitude and our intentions.

We hope that this simple and categorical offer will have a favorable influence upon the future negotiations. On one hand it will raise for us a weapon of which we shall not fail to make use, in letting it be known that our conciliatory intentions are not accompanied by inconsistent acts. On the other hand, it will bear witness to our confidence in the result of a serious valuation of our properties, whatever method therefor may be adopted.

We have to regret to see separate from us, upon this question, our honorable colleagues, M. Hutin, president and director-general, and M. Choron, administrator and director of the works. Their resignations, which have been accepted, leave a great void in the council, which will preserve the memory of their wisdom and devotion.

Death has taken from us in the course of the year our colleague, M. Rouget, former inspector-general of finance. You will join us in rendering to the memory of M. Rouget a sincere testimonial of profound respect.

Making use of the right conferred upon us by article 23 of the by-laws, we have replaced MM. Hutin and Choron by MM. Forot, former comptroller-general of the army, and Bourgeois, former receiver of the finances at Paris. We ask you to ratify these nominations, as well as that of M. Richmann, whom we have called to the council upon the death of M. Rouget. M. Richmann is recommended to your election by long services rendered in the administration of the finances, where he recently occupied the high post of central receiver of the department of the Seine.

We ask of you also, by way of completing the council, to be good enough to select for the office of administrator M. Gueydan, former negotiator with the United States.

Gentlemen, it appears to us superfluous to call your attention to the resolution which is submitted to you on the subject of the attitude to be

taken with regard to the Government of the United States. After a conscientious examination of the situation we have arrived at this conviction, that no other method of negotiations is adapted to the circumstances.

It is true, and we should call your attention to it, that the solution we propose does not depend exclusively upon the agreement to be reached between our company and the great American Republic. This solution is subjected, besides, to the arrangements to be concluded between the Government at Washington and the United States of Colombia.

But, at least, in the sphere which belongs to us, we have done what is demanded, not only by your interests but by those that take their origin in the old Panama Canal Company.

[Here follow four resolutions, one approving the accounts as reported, two concerning current business, including the election of the officers above referred to, and the other as below:]

The general meeting, after having heard the report of the council of administration, approves the conclusions of that report and gives all powers to its council of administration to negotiate the cession of the properties, concessions, privileges, etc., of the company and to contract, under the reservation of ratification by the stockholders.

---

**EXHIBIT O.**

**JUDGMENT OF AUGUST 2, 1901 (CIVIL TRIBUNAL OF THE SEINE), AUTHORIZING THE LIQUIDATOR TO CONSENT TO ARBITRATION.**

AUGUST 2, 1901.

**REQUEST FOR THE INCREASE OF THE POWERS OF THE LIQUIDATOR.**

[12th Chamber, No. 83.]

[Taken from the minutes of the clerk of the civil tribunal of first instance of the department of the Seine, sitting at the palace of justice, Paris.]

The civil tribunal of first instance of the department of the Seine, in session in the palace of justice in Paris, rendered in the chamber of the council the decision, the tenor of which is as follows:

The tribunal assembled in the chamber of the council in view: First, of the request presented by Gautron in his official capacity, signed by Biéville, attorney, and the tenor of which is as follows:

To MM. the President and Judges composing the chamber of the council of the civil tribunal of the Seine:

M. P. Gautron, liquidator of the *Compagnie Universelle du Canal Interocéanique de Panama*, residing at the seat of the liquidation, Rue de la Chaussée d'Antin No. 42, M. Biéville acting as his attorney, has the honor to state to you:

That the judgment of the civil tribunal of the Seine dated February 4, 1889, which declared the dissolution and the placing in liquidation of the *Société du Canal Interocéanique de Panama*, has appointed M. Joseph Brunet as liquidator of the said company with the most extended powers, especially to cede or contribute to any new company all or part of

the corporate assets, to make or ratify with the contractors of the Panama Canal all agreements for the purpose of insuring the continuation of the works, and of contracting loans and furnishing all guarantees thereto;

That the tribunal said that, in case of the disability of the appointed liquidator, his place should be filled by the usual methods;

That it thereupon authorized him to solicit in the same way all special powers which should be necessary for the fulfillment of his mission, and if he judged it useful, the addition of one or more liquidators;

That M. Achille Monchicourt was named assistant liquidator of the Compagnie Universelle du Canal Interocéanique de Panama by the judgment of the chamber of the council dated February 13, 1890;

That after the resignation of M. Brunet, M. Achille Monchicourt solicited and obtained the addition of M. Gautron joint liquidator by the terms of a judgment of the chamber of the council of July 21, 1893;

That in consequence of the death of M. Achille Monchicourt, M. Gautron remained the sole liquidator;

That the liquidation of the Compagnie Universelle du Canal Interocéanique de Panama is at this moment confronted with negotiations entered into by the Compagnie Nouvelle du Canal de Panama with the Government of the United States of North America and with the eventuality of the transfer of the concession and canal works either to the Government of the United States or to a foreign company;

That this transfer could not be validly made by the new company except with the concurrence and assent of the liquidation of the Compagnie Universelle du Canal Interocéanique de Panama and of the representative of the bondholders and creditors of the liquidation;

That the liquidation may find itself in disaccord with the Compagnie Nouvelle as to the price to be asked or the conditions to be proposed to the eventual purchaser;

That there exists a difference of interests between the liquidation and the new company upon the subject of a division of the proceeds of the said transfer;

That an immediate discussion might bring about no result and would be of a nature to injure the result of negotiations pending with an eventual purchaser;

That it is essential to submit the questions in dispute which may arise to the decree of amicable arbitrators charged with deciding all questions relating to—

Firstly. The determination of the price and the conditions to be proposed to the eventual purchaser;

Secondly. The division of the proceeds of the sale should such sale be effected;

That the right of liquidators of companies to compromise is contested by certain legal authorities as exceeding acts of their administration;

That it is therefore necessary to solicit from the tribunal the authority for M. Gautron to consent to an arrangement under the circumstances above stated, and in the case of the sale of the concession and the canal works as well as all of the assets of the Compagnie Nouvelle.

Wherefore the petitioner prays that it may please the president and judges to authorize him in his capacity of liquidator of the *Compagnie Universelle du Canal Interocéanique de Panama* to pass an agreement with the *Compagnie Nouvelle du Canal de Panama* upon all matters of dispute which may arise in connection with—

Firstly. The determination of the price and the conditions to be proposed to the eventual purchaser of the concession and canal works and all the assets of the new company;

Secondly. The division of the proceeds of the sale between the new company and the liquidation of the *Panama Canal Company* should such sale be effected.

Under all reserves.

And this will be just.

DE BRIEVILLE.

In view, secondly, of the decree of the president of the tribunal being as follows, the above request shall be communicated to the attorney for the Republic in his office, and we appoint Vice-President Laporte to make his report.

Paris, the 31st day of July, 1901.

BAUDOIN.

In view, thirdly, of the conclusions of the attorney for the Republic, which are as follows, the attorney for the Republic does not object.

Rendered in the attorney's office August 2, 1901.

PEZOUS.

In view, fourthly, of the various documents submitted,

Having heard Vice-President Laporte in his report, the attorney for the Republic in his conclusions, and after having deliberated in conformity with law, judging in first instance:

Whereas by a judgment of this chamber, dated July 21, 1893, Achille Monchicourt petitioned for and obtained the addition of Gautron as coliquidator of the *Compagnie Interocéanique de Panama*;

Whereas, in consequence of the death of Achille Monchicourt, Gautron remained the only liquidator;

Whereas, from the documents submitted it appears that it is necessary to authorize Gautron to consent to a compromise in compliance with his request;

For these reasons:

Authorizes Gautron, in his official capacity, to consent to a compromise with the *Nouvelle Compagnie du Canal de Panama* upon all litigious questions which might arise relating—

Firstly. To the determination of the price and conditions to be proposed to the eventual purchaser of the concession and the canal works and all the assets of the new company;

Secondly. To the division of the proceeds of the sale, if that sale should be effected, between the new company and the liquidation of the *Panama Canal*.

LA PORTE,  
LE BERQUIER,  
FLOQUET.

Ordered and decreed in the chamber of the council of the civil tribunal of the first instance of the department of the Seine, sitting in the palace of justice in the city of Paris, by Laporte, president; Berquier, judge; Planchenault, special judge; in the presence of M. Pezous, substitute for the attorney for the Republic, assisted by Floquet, clerk.

August 2, 1901.

(In consequence, etc., \* \* \*)

The minute was signed by the president, the reporting judge, and the clerk.

Recorded at Paris the 19th of August, 1901, folio 94, division first. Received 9 francs, 38 centimes, decimes included.

VARINOT.

A true copy.

FLOQUET.

#### EXHIBIT P.

RESOLUTION OF DECEMBER 23, 1901, OF THE COUNCIL OF THE ADMINISTRATION OF THE NEW PANAMA CANAL COMPANY, TO AGREE TO ARBITRATE WITH THE LIQUIDATOR.

[Extract of the minutes of the meeting of December 23, 1901.]

Were present: MM. Bô,

Bourgeois,

Couvreur,

Forot,

Gueydan,

Le Baron de Lassus St. Genies,

Georges Martin,

Monvoisin,

Rischmann,

Terrier,

Samper, representing the Colombian Government.

The board, after discussion, resolves, unanimously, to enter into the proposed agreement with M. Gautron, liquidator of the Compagnie Universelle, and gives all powers to MM. Bô and Monvoisin to sign same agreement.

The president of the Council of Administration,

(Signed)

Bô.

#### EXHIBIT Q.

AGREEMENT OF DECEMBER 24, 1901, REGARDING  
ARBITRATION.

BETWEEN THE UNDERSIGNED:

1st.—M. Jean Pierre Gautron, acting in his capacity of Liquidator of the Compagnie Universelle du Canal Interocéanique de Panama.

2nd.—The Compagnie Nouvelle de Panama represented by MM. Ma-

rius 30 and Monvoisin, Administrators, by virtue of a resolution of the Council of Administration dated December 23, 1901.

It has been stated and agreed as follows—

STATEMENT:

By the terms of article 52 of the by-laws of the New Panama Canal Company, the profits of the enterprise, such as had been determined by article 51, were to be divided between the stockholders of the New Panama Canal Company and the Liquidation of the *Compagnie Universelle de Panama* in the proportion of 40% to the former and 60% to the latter.

As negotiations may be opened for the sale of the Panama Canal enterprise to the Government of the United States of North America, a sale which would modify profoundly the conditions of its contribution to the enterprise, the Liquidation of the *Compagnie Universelle* has held: 1st.—That these negotiations could not be carried on without its intervention; 2nd.—That the price of the sale could not be fixed except in agreement with the Liquidation; 3rd.—That the share to go to the Liquidation in the said proceeds should be larger than the proportion fixed by article 52, on account of the damage suffered by the Liquidation from the fact of the sale and the consequent abandonment of its rights to the eventual future profits of the enterprise.

While maintaining a contrary opinion upon these three points, the New Company has admitted that, as a matter of fact, in default of a previous agreement with the Liquidation, there might be difficulty in bringing the negotiations to a successful conclusion. It therefore proposed that the direction of the negotiations and the power to treat should be accorded to the New Company, remarking, on the one hand, that they could with difficulty be conducted by two persons, and on the other hand, that the pecuniary interests of the Company which, moreover, appears as alone invested with ownership, so far as third parties are concerned, gave all necessary guaranty to the Liquidation for the conduct of the negotiations and their eventual conclusion; and it offered to submit to the decision of a Tribunal of Arbitration the third claim of the Liquidation of the *Compagnie Universelle*.

Coinciding with these views, M. Gautron, Liquidator of the *Compagnie Universelle*, in accord with M. Lemarquais, the judicial representative of the bondholders, on the one hand, and the New Panama Canal Company, on the other hand, have, under the advice of their counsel, entered into the following agreement:

AGREEMENT:

ARTICLE FIRST:

The New Panama Canal Company alone remains charged with carrying on the negotiations. It shall have full powers to conclude eventually with the Government of the United States and to fix, after discussion with it, the price and conditions of the sale.

## ARTICLE SECOND:

A Tribunal of Arbitration is hereby appointed, charged, from now on, with the determining the proportions in which the proceeds of the sale shall be assigned to the New Panama Canal Company and to the Liquidation of the Compagnie Universelle.

This Tribunal of Arbitration shall be composed of five members.

## ARTICLE THIRD:

The New Company designates:

MM. Du Buit and Léon Devin.

M. Gautron, in his official capacity, designates on his side:

MM. Limbourg and Henri Thiéblin.

The two parties have agreed to designate as fifth arbitrator M. Bétolaud, late chairman of the Bar Association.

## ARTICLE FOURTH:

The arbitrators shall render their decision within the month which will follow the convening of the Tribunal of Arbitration.

They are freed from the rules and forms of procedure; they shall decide as amicable arbitrators, without appeal or recourse to the Supreme Court.

## ARTICLE FIFTH:

The present agreement is made:

1st. So far as concerns the Liquidator of the old Company, by virtue of the authority to compromise which was conferred upon him by the judgment of the Chamber of the Council of the Civil Tribunal of the Seine dated August 2nd, 1901.

2nd. So far as concerns the New Company, by virtue of the powers which article 28 of the by-laws confers upon the Council of Administration, but subject to final approval by the general meeting of shareholders of the conditions of the transfer to the United States Government.

Done in duplicate at Paris, the 24th of December, 1901.

Read and approved,

Signed: M. Bo.

Read and approved,

Signed: GAUTRON.

Read and approved,

Signed: M. MONVOISIN.

NEW PANAMA CANAL COMPANY

Joint Stock—Capital: 65 millions of francs.

Corporate office: 7 rue Louis le Grand, Paris.

---

EXHIBIT R.

## AWARD OF ARBITRATORS, FEBRUARY 11, 1902.

In the year one thousand nine hundred and two and on the twenty-first of January at nine o'clock in the evening, in the study of M. Bétolaud, former President of the Bar, 25 Avenue Marceau, at Paris, and in

his presence, met MM. du Buit, former President of the Bar, Léon Devin, former President of the Bar, Limbourg and Henri Thiéblin, barristers of the Court of Appeal of Paris, all five appointed arbitrators by the agreement of compromise hereinafter mentioned. And thereupon appeared before them MM. Marius Bô and Monvoisin, administrators of the New Panama Canal Company, in the name of which they act, attended by Me. Dubourg, attorney of the Court, and counsel of the New Panama Canal Company. A letter was read from M. Gautron, Liquidator of the Compagnie Universelle du Canal Interocéanique de Panama, who excused himself, on account of the state of his health, for not being able to attend the hearing. In his absence Me. de Biéville, counsel of the Liquidation, represented his interests. Finally appeared M. Lemarquis, acting as legal representative of the bondholders of the Compagnie Universelle du Canal Interocéanique de Panama.

After the reading of the agreement of compromise of December 24th, 1901, which will be annexed to these presents and recorded at the same time with them, MM. Bô and Monvoisin called upon the five arbitrators appointed to state whether they accept the office conferred upon them. MM. de Biéville and Lemarquis state that they have no objection to make to this request and that they unite in it, so far as may be necessary.

Whereupon the five arbitrators appointed stated that they accepted the duties confided to them and they immediately organized as a tribunal of arbitration under the presidency of M. Bétolaud.

And they signed, after reading, with the parties present and their counsel.

Signed: M. Bô, Monvoisin, A. de Biéville, Dubourg, Léon Devin, Du Buit, Henri Thiéblin, Limbourg, A. Bétolaud, Lemarquis.

And, without adjournment, we, the arbitrators, declared, in agreement with the parties present, the hearing opened.

Thereupon Me. de Biéville spoke in the name and on behalf of the Liquidation of the Compagnie Universelle du Canal Interocéanique de Panama, to state the matter in dispute and to support the claims of the Liquidation, reserving the right to file a brief later.

After which, at half-past eleven o'clock, we, the Arbitrators suspended the hearing, and adjourned, in agreement with the parties present, to Monday the 27th of the current month, at half-past eight o'clock in the evening, at the same place as above, to hear the explanations which will be presented by the New Company, it being agreed by both sides that upon that day the parties shall file written briefs. And we signed with the parties after reading.

Signed: M. Bô, Monvoisin, A. de Biéville, Dubourg, Léon Devin, H. du Buit, Henri Thiéblin, Limbourg, A. Bétolaud, Lemarquis.

---

On the fourth of February in the year one thousand nine hundred and two, at half-past eight o'clock in the evening, we, the five arbitrators named in the preceding minutes, met in the study of M. Bétolaud, one of us. And before us appeared: M. Jean Pierre Gautron, ju-



dicial Liquidator of the Compagnie Universelle du Canal Interocéanique de Panama, M. Henri Boudet, Secretary General of the said Company, M. Lemarquie, Representative of the bondholders of the Panama Company, M. Marius Bô and M. Monvoisin, representing the New Panama Company. It was thereupon explained that the hearing which was to have taken place on the date of Monday, January 27th, was adjourned at the request of both parties, and postponed, by agreement, to to-day at the same place and time. M. de Biéville filed a brief in the name of the Compagnie du Canal Interocéanique de Panama in liquidation, and undertook to furnish, in 48 hours, a copy on stamped paper to be annexed to these presents. The floor was given to M. Chaumat, advocate of the Court of Appeal, present and assisting the representatives of the New Panama Canal Company.

And at this moment M. Gautron, prevented by his health from being present at the first meeting, stated that, having examined the foregoing minutes, he gave his full consent thereto. And foreseeing that, for the same reasons of health, it would not be possible for him to remain until the end of the hearing, he reserved the right to withdraw when he should find it necessary, delegating henceforth all his powers to M. Boudet, Secretary General of the Company in liquidation. And he signed, in this place, the present statement.

Signed: GAUTRON.

M. Chaumat set forth the arguments which the New Company undertook to file on stamped paper on the evening of the day after to-morrow, Thursday, to be annexed to these presents. After the argument of M. Chaumat, remarks were made by Me. de Biéville in reply, and after him by MM. Lemarquie and Monvoisin, in the presence of Me. Dubourg, attorney, who came in during the course of the hearing. None of the parties nor their counsel desiring to be heard further, the case was closed, the arbitrators reserving the matter for consideration among them later.

The hearing was closed at midnight and we, the arbitrators, signed with the parties and their counsel, after reading.

Signed: Henry Thiéblin, A. Bétolaud, Limbourg, Léon Devin, Dubourg, Henri Boudet, Bô, H. du Buit, Monvoisin, J. Chaumat, A. de Biéville, Lemarquie.

And just as they were about to withdraw, MM. Bô and Monvoisin, in the name of the New Company, M. Boudet, as substitute for M. Gautron and for M. Lemarquie, representative of the bondholders, all acting by virtue of powers conferred upon them, stated that they waived the filing of the decision by the arbitrators in the clerk's office. The original of the decision with the minutes of the arbitration and the documents annexed, shall be placed in the hands of Me. de Biéville, the attorney of longest standing, appointed by agreement of the parties, who shall send to each of them a copy of the decision, certified by him, as well as of the minutes. And the parties signed, after reading.

Signed: M. Bô, Henry Boudet, Monvoisin.

On the 11th of February, in the year one thousand nine hundred and two, at half-past eight o'clock in the morning, we, the five arbitrators, mentioned in the foregoing minutes, met in the study of M. Bétolaud, one of us, where, after having continued our consultations and examined anew the briefs of the parties, of which two originals on stamped paper have been heretofore filed, one by the liquidator, the other by the New Company, and will be annexed to these presents, to be recorded at the same time with it, have rendered our decision as follows:

#### THE TRIBUNAL OF ARBITRATION:

Considering, as matter of fact, that on the occasion of the negotiations entered into by the New Panama Canal Company, with the consent of the Liquidator of the *Compagnie Universelle du Canal Interocéanique de Panama*, with a view to a sale of the enterprise to the Government of the United States, the New Company and the Liquidator, having to consider in what way, if the sale should take place, the division of the price of sale should be made between them, could not agree upon the bases of this division;

That the New Company maintained that the division of the price should be made in conformity with the provisions of Articles 51 and 52 of its articles of incorporation, in this sense, that the New Company would have the right to take out, before any division, the total amount of its corporate capital, and that the remainder of the price should be allotted, 60 per cent. to the Liquidator and 40 per cent. to the New Company; that it desired it to be noted, however, that it did not oppose the Liquidator's being authorized, after it had taken out its capital, to take out the sum of twenty million francs, for the Panama Railroad shares;

That the liquidator, on his side, maintained that the articles of incorporation had not settled the effect which a sale of the enterprise should have upon his relations with the New Company; that the division of the price of this sale should be made between the New Company and the Liquidation, after taking out for the benefit of the latter a sum of twenty million francs for the Panama Railroad shares, in the proportion of the value of their respective contributions, and that, in any case, the Liquidation should receive at least a sum equal to that which a sale of the assets of the old company would have produced, if the New Company had not been formed;

That it was in view of this disagreement that the parties agreed to refer to amicable arbitrators the settlement of the dispute;

Considering that the first question to be settled by the arbitrators is to ascertain whether the provisions of the articles of incorporation considered literally or in their spirit, are applicable to a division of the price of a sale between the two parties in interest;

That it is proper, for this purpose, to seek in the articles the provisions by which the contracting parties have regulated between themselves the different situations which, they foresaw, might arise in the future;

Considering that article 2 shows that the object of the Company is, 1st, the completion of the canal; 2d, its operation; 3d, the construction and operation of all lines of railroad in the vicinity of the canal; 4th, the exploitation of the lands granted and the mines therein contained; all subject to the clauses and conditions of the concession granted by the United States of Colombia;

That article 5 enumerates the contributions made by the Liquidator of the *Compagnie Universelle du Canal Interocéanique de Panama*, consisting of 1st, the concession itself with all its benefits and all its burdens; 2d, the work executed, yards, shops, buildings, hospitals, machinery, materials and supplies, deposits as security, etc.; 3d, the plans, estimates, studies, documents of every nature relating to the canal, as well as all agreements with third persons; 4th, the shares in the railroad from Panama to Colon, operated by the American Company called the *Panama Railroad Company*, of which the Liquidation is the owner;

That these contributions carried the entire title to the property;

That no remuneration was provided for the benefit of the Liquidator who made them, either in cash or in shares;

But that they were made under certain reservations and conditions;

That it was provided, in the first place, that the Liquidator should have 60 per cent. of the net profits of the enterprise as fixed by articles 51 and 52; that is to say, after deduction of the share promised to the Colombian government, of the expenses of maintenance, operation and administration, of the sums necessary on account of loans, for the legal reserve of 5 per cent. of the corporate capital, intended to insure the amortization of the shares, and to pay interest upon the shares not amortized, and of 5 per cent. for the benefit of the council of administration;

That 50,000 full paid shares were set apart for the Government of Colombia;

That, as to the Panama Railroad shares, their final disposition was regulated in a different way according to three possible events;

That it was said in Article 75 that, when the New Company should have expended at least half of its corporate cash capital for the work to be done upon the Canal and for the discharge of the incumbrances resulting from the contribution, a special technical commission should pronounce upon the results gained and the conclusions to be drawn for the remainder of the enterprise, that the opinion of the Commission should be made public and that a special stockholders' meeting should be called for the purpose of considering ways and means tending to the completion of the work, and the stipulations contained in Article 5, sec. 4, No. 3;

That article 5 provided that the Panama Railroad shares should remain the property of the New Company from this meeting, without any pecuniary compensation, but upon the condition subsequent of the construction of the canal within the period fixed by the concession, and that, in default of completion within this period, the shares shall revert to the Liquidation;

That it provided furthermore that if, contrary to all expectation, the meeting should not take the necessary action for the completion of the Canal, or if the course of action adopted by the meeting could not be carried out, the shares should remain the property of the New Company, but it should pay to the Liquidation the sum of twenty million francs by way of indemnity and the share of profits set apart for the Liquidation should be half the profits of the company without other deduction than that of the expenses of administration and of the legal reserve;

That, consequently, the shares should remain inalienable until either the payment of the sum of twenty millions or the completion of the canal;

Considering that it results from these provisions, taken together, that the object aimed at by the two contracting parties was the completion of the Canal and its operation, the profits of this operation, divided annually between the two participants in the proportion of sixty and forty per cent., being intended alone to furnish a remuneration for their respective contributions;

That they had, nevertheless, considered the hypothesis of non-completion of the Canal, and that, in this case, the Liquidator was to take back part of his contributions, to wit, the Panama Railroad shares, and that he was to take them back either as they were, or in money and with a share in the profits of the operation of the railroad, according to the possible events above taken into account;

That, in short, the contracting parties had considered three distinct hypotheses, upon the accomplishment of which were to depend, in different proportions, the rights of the shareholders, contributors of cash capital, and those of the Liquidator, contributor without pecuniary compensation of almost all the assets of the Liquidation of the *Compagnie Universelle du Canal Interocéanique de Panama*, to wit: 1st, the completion of the Canal and its operation; 2d, the non-completion of the Canal after the voting by the meeting of means to complete it and the carrying out of the provisions adopted; 3d, the non-completion of the canal on account of failure of the meeting to adopt the necessary provisions, or failure to carry out these provisions;

Considering that the proposed sale to the Government of the United States of the entire assets of the New Company, including the Panama Railroad shares, does not come exactly under any of these hypotheses;

That it is, in fact, neither the completion of the canal, nor its abandonment under the special circumstances mentioned in the articles of incorporation;

That it is not a mere abandonment of the enterprise as contemplated in article 5 of the articles of incorporation, since the New Company, intending to convey to the Government of the United States all its assets, including the Panama Railroad shares, could neither restore them to the Liquidator as they are, nor, keeping them by the payment of an indemnity of twenty million francs, afford the Liquidation the share of 50 % which it had undertaken to give in the annual profits from the operation of the railroad;

That neither is it the completion of the canal under the circumstances contemplated by articles 5, 51 and 52 of the articles of incorporation.

That in these articles was contemplated the completion of the canal, its operation by the New Company and a division between it and the Liquidator of the annual profits of operation;

That in that event the repayment of the capital of the New Company was assured only by means of a sinking-fund of long duration, extending to the end of the concession;

That the annual deduction intended for the sinking-fund was only 5 % of the corporate capital;

That the New Company was preferred only to this limited extent;

That, beyond this, the remuneration of the contributions in property made by the Liquidator and of the contributions in cash made by the shareholders went on concurrently and proportionally;

That the claim of the New Company to take out, immediately and by way of preference, from the price of sale, the whole of its cash contribution and not allow the Liquidator to participate, except in the balance of the price, is not, therefore, justified by the provisions of articles 51 and 52 of the articles of incorporation;

Considering that, on his side, the Liquidator maintains that the division of the price of sale should be made in proportion to the comparative value of the shares of the two contracting parties in the property to be transferred; that he contends that, this property having a value of 565,500,000 francs according to a valuation made by the New Company itself, the share of the New Company would represent a value of 57,500,000 francs and that of the Liquidation 508,000,000 francs, so that the price should be divided in the proportion of 58/565 for the Liquidation and of 57/565 for the New Company, and that, in any case, the Liquidator should receive at least a sum corresponding to that which he would have got from a sale of his assets, if the New Company had not been formed; that he estimates this sum at one hundred and twenty million francs;

That he points out, in support of his position, that the articles of incorporation did not regulate, as between the two contracting parties, the consequences of a sale of the enterprise and, furthermore, that the New Company, in not completing the canal, has not accomplished the work for which it was formed, and for which the Liquidation consented to the great sacrifices which enabled it to be formed;

But considering that, if the sale to the Government of the United States cannot be assimilated to the completion of the canal and its operation, and if it is true that the New Company has not carried out the projected enterprise, we cannot, nevertheless, fail to recognize the importance of the part which it played in the common interest, and wholly deny it the benefit of the initial agreements;

That it is the more necessary to take these initial agreements into account, so far as possible; that the New Company accomplished, in the most useful way, the task which was assigned to it, at least as a prospecting company; that, especially by its negotiations and at its expense,

it obtained the extension of the concession, an extension without which the enterprise would have been lost, and that it has, by its work, prudently and economically carried on, demonstrated the possibility of completing the Canal with locks, and made it possible to fix, with more precision, the cost and duration of the work to be done for this completion; that it has not only preserved, but also greatly improved and increased the property of the old company and has made possible either the completion of the enterprise by the means of new capital to be procured, or a sale, such as that which is now proposed;

That it has therefore attained, in part, at least, the object aimed at.

Considering that the same reasons which led to a rejection of the extreme claims of both parties, leads us to seek for a solution which approaches as nearly as possible to the common intention of the contracting parties as it can be made out from the articles of incorporation;

Considering that, so far as concerns the Panama Railroad shares the articles of incorporation may be applied;

That, in fact, the Canal not being completed, and the New Company being unable to restore the shares as they are, since they are to be included in the sale, it should be decided that the Liquidator has a right to the indemnity of twenty millions, provided by article 5 in case of non-completion of the canal;

That, moreover, the claim of the Liquidator to this preference is not opposed by the New Company;

Considering, for the rest, that in default of an exact rule to be applied, a case has arisen for the arbitrators to use their powers of amicable adjusters which have been expressly conferred upon them, departing as little as possible from the spirit of the articles of incorporation;

Considering that there should be set aside the sum of five million francs which was devoted by the New Company to obtaining on April 25th, 1900, a new extension of the concession;

Considering that this sum served directly, in the common interest, to preserve its most essential possession;

That it is therefore proper, in accordance with the general principles of law, that the New Company should first take out said sum of five millions, after the twenty millions mentioned above;

Considering, so far as concerns the balance of the price of sale, after satisfaction of these preferences, that, by fixing in articles 51 and 52 of the articles of incorporation the division between them of the annual revenue from operation, the contracting parties have given an indication of the value of their respective contributions, as they then considered them, and that it is impossible not to take this into account in the division of the proceeds of sale;

That, under the present circumstances, it is just and equitable to make this the basis for the division of the price;

Considering, so far as concerns the expenses, that in view of the peculiar character of the case, and each of the parties, moreover, failing in part of its claims, they should be combined, and it should be decided that they be borne half by the New Company and half by the Liquidator;

## FOR THESE REASONS DECIDES:

1st. That the consequences of a sale of the enterprise are not regulated by the wording of the articles of incorporation;

2d. That the Liquidator of the Compagnie Universelle du Canal Interocéanique de Panama shall, before any division, take out of the price of the sale of the enterprise to the Government of the United States the sum of twenty million francs;

3d. That after this sum has been taken out the New Panama Canal Company shall take out, on its side, the sum of five million francs;

4th. That the balance of the price of sale shall be divided between the parties entitled in the proportion of sixty per cent. for the Liquidator of the Compagnie Universelle du Canal Interoceanique de Panama and of forty per cent. for the New Panama Canal Company;

5th. That the remainder of the demands, propositions and requests of the parties are dismissed;

6th. That the expenses, including the fees of the arbitrators, shall be combined, to be borne half by each of the parties;

7th. That the costs which the filing of the judgment would entail, including registration fees, shall be borne by that one of the parties who shall have made it necessary.

And we, the arbitrators, have signed after reading.

Signed: HENRI THIÉBLIN,  
A. BÉTOLAUD,  
LIMBOURG,  
LÉON DEVIN,  
H. DU BURT.

Certified a true copy.

Signed: DE BIÉVILLE.

## EXHIBIT S.

## LAST REPORT (1901) OF THE BOARD OF DIRECTORS OF THE PANAMA RAILROAD COMPANY.

*Board of directors, 1901.*—J. Edward Simmons, Edward A. Drake, Xavier Boyard, Samuel M. Felton, William B. Franklin, J. H. Parker, William Nelson Cromwell, Vernon H. Brown, Charles Einsiedler, Robert M. Gallaway, A. Lawrence Hopkins, C. B. Comstock, Maurice Hutin.

*Executive committee.*—J. Edward Simmons, Edward A. Drake, William Nelson Cromwell, Xavier Boyard, Vernon H. Brown.

*Officers.*—J. Edward Simmons, president, New York; Edward A. Drake, second vice-president and secretary, New York; Sylvester Deming, treasurer, New York; Charles Paine, general manager, New York; Sullivan & Cromwell, general counsel, New York; R. L. Walker, traffic manager, New York; John Adams, auditor, New York; T. H. Rosebottom, assistant to secretary, New York; J. R. Shaler, general superintendent, Colon; H. G. Prescott, assistant superintendent, Colon; P. G. Baker, master mechanic, Colon; F. S. Highid, road master, Colon.

General offices, No. 24 State street, New York.

PANAMA RAILROAD COMPANY,  
New York, March 27, 1902.

*To the stockholders of the Panama Railroad Company:*

The past year was one of marked activity in the company's affairs. The report of the general manager, with the accompanying statement of earnings and expenses for the calendar year 1901 and the treasurer's balance sheet and transcript of profit and loss account, will furnish you detailed information upon the physical and financial aspects of the company's properties and business.

The capital stock issue of \$7,000,000 is unchanged.

The present outstanding bond issues are:

**Sinking fund 6 per cent subsidy bonds:**

Original issue of .....	\$3,000,000.00
(Being payment in advance until 1910 of the annual subsidy of \$225,000 to the Republic of Colombia.)	
Redeemed by annual sinking fund drawings, including \$144,000 drawn in 1901 .....	1,798,000.00
Outstanding at this date .....	1,202,000.00
Of those outstanding \$206,000 are owned by the company and held in its treasury .....	206,000.00
Leaving in the hands of the public .....	996,000.00

By the operation of the sinking fund provision of this issue all of the bonds outstanding will be redeemed in 1908.

**First mortgage 4½ per cent twenty-year gold bonds:**

Authorized issue of .....	\$4,000,000.00
Issued to the public .....	2,504,000.00
Redeemed by annual sinking fund drawings, including \$141,000 drawn in 1901 .....	561,000.00
Held in the company's treasury .....	935,000.00
	<u>\$4,000,000.00</u>

Through the operation of the sinking fund this indebtedness will be reduced by 1917, the date of the maturity of the mortgage, to \$1,199,000, and constitute the only mortgage lien upon the company's property.

Since the declaration of the previous dividend in January, 1893, in addition to the payment of \$250,000 annually to the Colombian Government and the redemption of \$561,000 of the company's 4½ per cent first-mortgage bonds out of gross earnings, the net earnings of the company amounted to \$2,072,359.42, or 29½ per cent upon the capital stock.

Of this sum your directors have applied to the development and permanent improvement of the company's property, in excess of the amount of the 2 per cent dividend paid in March last, \$1,755,509.01, in the purchase and betterment of its steamships and floating equipment, the construction of the La Boca Pier, port, and terminal, the acquisition



and restoration of dredging outfit, the installation of electric light and ice plants, etc., and in general so improving the company's property that it is to-day in better physical condition than at any time in its history.

The port and terminal at La Boca having been completed and opened to commerce on January 1, 1901, its construction account was closed, showing a total cost of \$2,148,303.69, and that outlay capitalized into the company's 4½ per cent first-mortgage twenty-year gold bonds authorized for that purpose.

As contemplated by contracts between the companies, a lease has been effected from the canal company of the La Boca Branch Railroad and adjoining lands necessary for the operation of the terminal during the life of the railroad company's concession, or until 1966, upon mutually satisfactory terms. The use of dredges, clapets, and materials necessary for the operation of the La Boca terminal, belonging to the canal company, have also been secured under lease, upon reasonable terms.

Owing to the severance of relations with the Pacific Mail Steamship Company, the company put on a line of chartered vessels between Panama and San Francisco direct, to maintain its coastwise traffic. Charters at the outset were difficult to obtain and very expensive, but later better conditions prevailed. The volume of coastwise traffic was materially increased during the year, but the very large outlay required to charter ships on both oceans to transport it was burdensome and represented interest on a capital sum which, had it been applied by the company to the construction of new vessels, would have made the business highly remunerative.

The company's business was adversely affected by political disturbances on the Isthmus of so grave a character as to have occasioned the landing there by the United States Government, under its treaty obligations, of its armed forces to maintain free transit and to protect this company's property. To the discreet and energetic performance of this delicate duty by the naval officers to whom it was intrusted, in concert with the Colombian authorities, is to be attributed the fact that the company's property was not materially impaired. These facts, together with a prolonged labor strike in San Francisco and a materially reduced coffee output in Central America and Mexico during the season of 1900-1901, considerably affected net earnings, but these are extraordinary conditions not generally encountered.

During the year an important deviation of the railroad at Culebra, necessitated by canal construction, was completed and put in operation; but its entire cost was borne and paid by the canal company.

The condition of the company's property has been fully maintained and many improvements added, for the interesting particulars of which I refer you to the general manager's report.

There is now under consideration a further increase of the facilities of the La Boca pier, in order to more expeditiously handle the increasing tonnage.

The result of the company's operations during the last year, under

what was referred to as the "open-door" policy, has not been as remunerative as desired, and the board of directors are considering changes in existing traffic arrangements and connections at Panama.

I refer you to the accompanying reports for more detailed particulars.

Respectfully submitted.

J. EDWARD SIMMONS, *President.*

PANAMA RAILROAD COMPANY,

*New York, March 18, 1902.*

To the PRESIDENT OF THE PANAMA RAILROAD COMPANY.

SIR: I respectfully submit the following report of the business and operations of the Panama Railroad Company for the year ending December 31, 1901, and of the condition of the company's property and finances at the close of the year.

The operations of the year show the following results:

*Statement of earnings and expenditures.*

Earnings.	1901.	1900.	Increase.	Decrease.
<b>EARNINGS.</b>				
<i>Railroad.</i>				
Colon to Panama:				
From freight.....	\$606,185.65	\$505,898.92	\$100,286.73	.....
From treasure.....	4,182.77	9,376.45	.....	\$5,193.68
From mails.....	52,254.08	45,653.70	6,600.38	.....
From extra baggage.....	9,695.40	8,546.59	1,148.81	.....
From passengers.....	39,236.81	38,614.86	621.95	.....
	711,554.71	608,099.52	103,464.19	.....
Panama to Colon:				
From freight.....	590,624.07	599,178.19	.....	8,554.12
From treasure.....	14,334.07	12,868.20	1,465.87	.....
From mails.....	4,780.47	5,116.47	.....	336.00
From extra baggage.....	7,460.37	7,890.79	.....	430.42
From passengers.....	36,417.87	37,852.07	.....	1,434.20
	653,616.85	662,906.72	.....	9,289.87
Total earnings of railroad...	1,365,171.56	1,270,996.24	94,175.32	.....
<i>Panama Railroad steamship line.</i>				
Atlantic service:				
From freight.....	718,607.88	769,225.62	.....	50,617.74
From treasure.....	4,951.65	8,044.02	.....	3,092.37
From mails.....	79,015.83	60,618.30	18,397.53	.....
From extra baggage.....	2,186.69	2,047.63	139.06	.....
From passengers.....	154,571.58	128,234.78	26,336.80	.....
From miscellaneous.....	7,517.21	7,814.88	.....	297.67
	966,850.84	975,985.23	.....	9,134.39
Pacific service:				
From freight.....	349,277.33	5,922.06	343,355.27	.....
From passengers.....	16,425.25	155.00	16,270.25	.....
From extra baggage.....	120.18	.....	120.18	.....
	365,822.76	6,077.06	359,745.70	.....
Joint railroad and steamship receipts.....	498,863.81	402,136.18	96,727.63	.....
Total earnings.....	3,196,708.97	2,655,194.71	541,514.26	.....

*Statement of earnings and expenditures—Continued.*

Earnings.	1901.	1900.	Increase.	Decrease.
<b>EXPENDITURES.</b>				
<i>Operating expenses of railroad.</i>				
General expenses on Isthmus.....	\$40,378.20	\$40,216.25	\$161.95	.....
Conducting transportation .....	373,022.88	309,516.83	63,506.05	.....
Maintenance of equipment.....	116,519.83	116,518.87	.96	.....
Maintenance of way and structures .....	95,341.62	95,810.60	.....	\$468.98
	625,262.53	562,062.55	63,199.98	.....
<i>Panama Railroad steamship line.</i>				
<i>Atlantic service:</i>				
Steamer expenses.....	585,877.45	576,391.96	9,485.49	.....
Agency expenses.....	117,202.81	116,689.67	513.14	.....
Charter of steamers.....	164,929.38	140,634.79	24,294.59	.....
	868,009.64	833,716.42	34,293.22	.....
<i>Pacific service:</i>				
Steamer expenses.....	216,580.21	3,801.11	212,779.10	.....
Agency expenses <sup>a</sup> .....	111,798.89	8.92	111,789.97	.....
Charter of steamers.....	279,659.33	6,650.00	273,009.33	.....
	608,038.43	10,460.03	597,578.40	.....
Joint railroad and steamship expenses .....	833,896.64	321,164.78	12,731.86	.....
Total operating expenses...	2,435,207.24	1,727,403.78	707,803.46	.....
Earnings over operating expenses .....	761,601.73	927,790.93	.....	\$166,289.20
<i>Appropriations for depreciation and special repairs of tugs.</i>				
Depreciation of tugs .....	2,100.00	2,100.00	.....	.....
Replacement of boilers and special repairs of tugs.....	3,000.00	3,000.00	.....	.....
	5,100.00	5,100.00	.....	.....
<i>Fixed charges.</i>				
Subsidy to Republic of Colombia.....	25,000.00	25,000.00	.....	.....
Redemption of subsidy bonds .....	144,240.00	136,080.00	8,160.00	.....
Interest on subsidy bonds ..	80,760.00	88,920.00	.....	8,160.00
Interest on first-mortgage bonds .....	70,200.00	75,926.25	.....	5,726.25
Redemption of first-mortgage bonds.....	150,000.00	150,000.00	.....	.....
Interest on balance due La Boca Wharf contractors ..	26,611.61	.....	26,611.61	.....
	496,811.61	475,926.25	20,885.36	.....
Total appropriations and fixed charges...	501,911.61	481,026.25	20,885.36	.....
Net income .....	259,590.12	446,764.68	.....	187,174.56

<sup>a</sup>Includes wharfrage at La Boca.

Gross revenue receipts, expenditures, and net earnings for 1901 compared, as under, with those of 1900:

	Earnings.	Operating ex- penses.	Earnings over oper- ating ex- penses.	Appropri- ations for depreca- tions, etc.	Net earn- ings.
1901.....	\$3, 196, 708. 97	\$2, 435, 207. 24	\$761, 501. 73	\$5, 100. 00	\$756, 401. 73
1900.....	2, 656, 194. 71	1, 727, 403. 78	927, 790. 93	5, 100. 00	922, 690. 93
Increase in 1901 ..	541, 514. 26	707, 803. 46			
Decrease in 1901 ..			166, 289. 20		166, 289. 20
Increase in fixed charges, 1901 ..					20, 885. 36
Decrease in profit, 1901.....					187, 174. 56

EARNINGS.

RAILROAD.

The total earnings of the railroad proper show an increase of \$94,175.32, or 7.41 per cent, in 1901 as compared with previous year, the principal increase being in freight traffic west bound.

The largest increase in west-bound freight was on business to San Francisco, amounting to over 10,000 tons; freight to South Pacific ports increased 7,000 tons. East-bound freight shows a decrease of 14,000 tons, although there was an increase of 12,000 tons in San Francisco freight.

There was an increase of 17.01 per cent in earnings on all west-bound traffic, and a decrease of 1.40 per cent on all east-bound traffic.

The following table shows the freight tonnage carried over the railroad in 1901 as compared with 1900:

	Year ending Dec. 31—		Increase.	Decrease.
	1901.	1900.		
Carried west bound <sup>a</sup> .....	Tons. 195, 743	Tons. 158, 758	Per cent. 27. 31	Per cent. .....
Carried east bound <sup>a</sup> .....	189, 841	203, 619	.....	6. 77
Total east and west bound <sup>a</sup> .....	385, 584	362, 377	7. 89	.....

<sup>a</sup> Ton of 2,000 pounds, or 40 cubic feet.

The gross earnings per ton moved on the road compare as follows:

	Year ending Dec. 31—		Increase.	Decrease.
	1901.	1900.		
West bound.....	\$3. 10	\$3. 29	Per cent. .....	Per cent. 5. 78
East bound.....	3. 11	2. 94	6. 78	.....
Average east and west bound.....	3. 10	3. 09	. 32	.....

Table No. 4, attached to this report, shows the origin and destination of the freight carried over the railroad.

Compared with 1900 the total tonnage carried over the road in 1901 shows an increase of 28,207 tons, or 7.89 per cent, and the earnings an increase of \$91,732.61, or 8.30 per cent. A comparison of 1900 with 1899 shows an increase in tonnage of 24.35 per cent, and in earnings of 15.83 per cent.

Of the total tonnage carried, 50.77 per cent was west bound and 49.23 per cent east bound. In 1900 these percentages were 43.02 per cent and 56.98 per cent, respectively.

The proportion of through traffic to the total tonnage handled was 81.70 per cent; in 1900 through freight amounted to 87.11 per cent. Of the through freight, 55.12 per cent was New York business.

Earnings from mails amounted to \$57,034.55, an increase of \$6,264.38, or 12.34 per cent.

The following statements shows the number of passengers carried and the passenger earnings:

*Number of passengers carried.*

Classification.	1901.	1900.	Increase.	Decrease.
			<i>Per cent.</i>	<i>Per cent.</i>
First-class passengers .....	4,587	5,590		17.94
Second-class passengers .....	84,574	77,642	8.93	
Total .....	89,161	83,232	7.12	

*Passenger earnings.*

Classification.	1901.	1900.	Increase.	Decrease.
			<i>Per cent.</i>	<i>Per cent.</i>
First-class passengers .....	\$28,507.47	\$31,375.56		9.14
Second-class passengers .....	47,147.21	45,091.37	4.56	
Total .....	75,654.68	76,466.93		1.06

*Average receipt per passenger.*

Classification.	1901.	1900.	Increase.	Decrease.
			<i>Per cent.</i>	<i>Per cent.</i>
First-class passengers:				
Through .....	\$8.96	\$8.97	0.11	
Local .....	3.73	3.44	8.43	
Second-class passengers:				
Through .....	3.77	1.92	96.35	
Local .....	.47	.61		7.84

First-class passengers decreased 1,003, or 17.94 per cent, in number, and \$2,868.09, or 9.14 per cent, in earnings. Second-class passengers increased 6,932 in number, or 8.93 per cent, and \$2,055.84, or 4.56 per

cent, in earnings. The increase of 96.35 per cent in the average receipt per second-class through passenger was due to the falling off in the movement of laborers from the West Indies to Guayaquil, carried at a low contract rate.

STEAMSHIP LINES.

The total earnings of the Atlantic Line from all sources was \$966,850.84, a decrease of \$9,134.39, or 0.94 per cent. Freight traffic shows a loss of \$50,617.74 in earnings, or 6.58 per cent, due to the large falling off in business from South Pacific ports. The decrease in freight receipts was nearly offset by an increase of \$18,397.53, or 33.5 per cent, in mail earnings, and an increase of \$26,336.80, or 20.54 per cent, in passenger earnings.

Of the total tonnage transported, 119,413 tons were carried by the company's steamers and 62,772 tons by chartered steamers.

The Pacific Line, inaugurated in December, 1900, was maintained during the year with the result as shown in the statement on page 8.<sup>a</sup>

JOINT RAILROAD AND STEAMSHIP RECEIPTS.

The net result of the earnings of all the accounts grouped under this heading increased \$96,727.63 over 1900, or 24.05 per cent.

The following table will show the number of tons lightered in Panama Bay and handled on La Boca wharf during the year 1901, as compared with cargo lightered in 1900:

	1901.	1900.	Increase.
	Tons.	Tons.	Per cent.
Merchandise .....	216,144	188,936	14.40
Lumber .....	409	255	60.39
Coal .....	22,286	5,692	292.22
<b>Total .....</b>	<b>238,839</b>	<b>194,873</b>	<b>22.56</b>

EXPENDITURES.

The revenue expenditures of 1901 and 1900 compare as under:

	1901.	1900.	Increase.
Railroad .....	\$625,262.53	\$562,062.55	\$63,199.98
Steamship line:			
Atlantic service .....	868,009.64	833,716.42	34,293.22
Pacific service .....	608,038.43	10,460.03	597,578.40
Joint railroad and steamship expenses .....	333,896.64	321,164.78	12,731.86
Appropriations for depreciation and special repairs to tugs .....	5,100.00	5,100.00	.....
<b>Total .....</b>	<b>2,440,307.24</b>	<b>1,732,503.78</b>	<b>707,803.46</b>

<sup>a</sup>Paging refers to Fifty-second Annual Report of the Board of Directors of the Panama Railroad Company for 1901.

This table shows an increase of \$707,803.46 in total revenue expenditures, while there was an increase of \$541,514.26 in total earnings. (See pp. 8, 10.)<sup>a</sup>

#### RAILROAD.

*Conducting transportation.*—The expenses of this department show an increase of \$63,506.05, or 20.52 per cent, as compared with 1900. The tonnage moved increased 28,207 tons, or 7.89 per cent.

The accounts show a considerable increase in the cost of labor, of fuel, and of supplies when compared with last year. There has been no increase in the rate for labor, but owing to the troubles on the Isthmus labor was less efficient, and it was necessary to maintain a larger force of Fortune Islanders than before. Coal and other supplies have commanded higher prices everywhere.

*Maintenance of equipment.*—The total charges to this department in 1901 were \$116,519.83 as against \$116,518.87 in 1900, although more tonnage was handled than in the latter year.

In addition to ordinary running repairs, three of the older locomotives, which had been laid by some years ago, have been completely repaired and restored to service. The repairs of cars have been extensive; 38 flat cars have been converted into coal cars by the addition of sides, and 102 coal cars have had their sides raised to increase their capacity; 4 flat cars were fitted with 20-ton trucks.

The car shop has received new tools, as follows: A patent band sawing machine, with a machine for filing it; an Acme bolt cutter, and a self-feeding rip saw.

*Maintenance of way and structures.*—The track, bridges, and buildings have been maintained at a high standard, the expenditures being \$95,341.62, a decrease of \$468.98, or 0.49 per cent, as compared with 1900.

There have been laid in main track 100 tons of new rails of 70 pounds per yard; the rails thus released have been used for the construction of much-needed sidings at Colon and Panama.

The repairs of masonry have been continued, the abutments and aprons of 10 bridges having had complete repairs, and 4 culverts were rebuilt.

At Frijoles a battery of hydraulic rams has been installed, dispensing with the steam engine and pumper, effecting a saving of \$500 or more per annum.

A new 6-inch water main from the reservoir at Mount Hope to the railroad, 1,500 feet in length, has been laid, nearly doubling the daily supply available at Colon.

The car shed in rear of the old passenger station at Colon has been converted into a storage warehouse for freight.

---

<sup>a</sup>Paging refers to Fifty-second Annual Report of the Board of Directors of the Panama Railroad Company for 1901.

STEAMSHIP LINES.

The operating expenses of the line between New York and Colon were \$868,009.64, an increase of \$34,293.22, or 4.11 per cent.

On December 16, 1900, the company was compelled to assume the operating of a steamship line between Panama and San Francisco at an unfavorable time, owing to the scarcity of vessels and the extremely high cost of charters. This was later complicated with a long-continued strike at San Francisco. During the latter part of the year, after the defeat of the strikers and a reduction in the cost of charters, the line became self-sustaining, as would appear in the accounts, if allowed the proportions previously allotted to that traffic. The importance of this line is indicated by the amount of tonnage carried, which was 85,541 tons, an increase 21,362 tons over the same route during the previous year. The total amounted to 49.26 per cent of the tonnage of the Atlantic Steamship line, and formed 22.18 per cent of the total carried across the Isthmus.

JOINT RAILROAD AND STEAMSHIP EXPENSES.

The combined expenditures under this head amounted to \$333,896.64, an increase of \$12,731.86, or 3.96 per cent.

The steamship *Bolivar* has been completely overhauled, receiving new boilers, pumps, etc., from New York.

Three steel launches, built at Chester, Pa., are now on the ways and nearly completed.

GENERAL REMARKS.

During the period from 1894 to 1901, inclusive, the percentage of total expenses to gross earnings was as follows:

	Per cent.
1894 .....	69.93
1895 .....	61.63
1896 .....	53.94
1897, including taxes and appropriations for depreciation, etc....	61.12
1898, including taxes and appropriations for depreciation, etc....	64.91
1899, including taxes and appropriations for depreciation, etc....	64.66
1900, including taxes and appropriations for depreciation, etc....	65.25
1901:	
Including taxes and appropriations for depreciation, etc.....	64.72
(Or including Pacific Line, not operated in 1900) .....	76.34

It is gratifying to find that the volume of traffic has been more than maintained, showing an increase over last year of 28,207 tons, in spite of the embarrassments under which all operations were conducted, by reason of the political disturbances, which occasionally interrupted traffic, caused alarm among laborers, added to the cost of insurance of



freight, and deterred timid passengers from taking the Isthmus route for fear of delay or injury.

The improvement in the condition of the company's plant upon the Isthmus, which was begun several years ago, has been continued during the year 1901.

It became necessary to supply an electric-light plant at Colon to supplement the deficient supply afforded by the Colon Illuminating Company, which was put into use very successfully at the beginning of the year; in connection with this is an ice machine, made necessary by the frequent failures of the supply heretofore received from Panama, which promises to be self-supporting.

The improved condition of the track seemed to warrant an increase in the loads carried in the freight cars; therefore the maximum load has been increased from 10 tons to 12. This was equivalent to the addition of 184 cars in the capacity of the rolling stock, and has been of much benefit to the service.

The steamships owned by the company have been maintained in complete repair; it is believed that none of its property has depreciated.

The ship ways for the repair and construction of the floating equipment at Panama having completely decayed, they were renewed at La Boca under a shed available there, in connection with a convenient shop and tools, leased from the New Panama Canal Company, and the tools and shop force formerly at Panama have been consolidated with those at La Boca. At this establishment a large amount of work has been done.

The dredges, clapnets, etc., leased from the canal company for the maintenance of deep water at La Boca have been very extensively repaired; the general overhauling of the steamer *Bolivar* has been completed; the three new launches, mentioned elsewhere, are now being set up. In addition, the repairs of the transporters on the piers and repairs of foreign steamships were made at the new La Boca shops.

In Colon the ship berths at Pier No. 1 required dredging, to accommodate deeper laden coal ships. To affect this the plant was increased by the purchase of a new "Hayward orange-peel bucket," which will also be useful in the future.

Important improvements have been undertaken and partly completed upon Pier No. 2, at Colon, whereby an additional berth for the convenient handling of coal ships has been gained, and the long-distance trucking heretofore necessary there will be avoided, three tracks connecting with the main line having been laid down the whole length of the wharf.

An annex for the reception of any case of contagious disease has been added to the hospital at Colon.

The officers and employees have been devoted to the interests of the company. Upon the Isthmus they have had to encounter the dangers incident to a state of war, and have exhibited courage as well as good judgment in their dealings with the contending factions.

Respectfully,

CHARLES PAINE, *General Manager.*



**S. DEMING, Treasurer.**

TABLE 13.—Profit and loss account, December 31, 1901.

To one hundred and thirteenth dividend .....	\$140,000.00	By balance, Dec. 31, 1900 .....	\$3,867,831.69
Operating expenses .....	2,483,207.24	Gross earnings .....	8,194,708.97
Appropriations for depreciation and special repairs of tugs .....	5,100.00	41 per cent 20-year sinking-fund gold bonds, redeemed .....	141,000.00
Fixed charges .....	496,811.61	Accounts of previous years settled .....	1,137.42
Supplies of no value written off .....	486,775.45		
Uncollectible accounts written off .....	18,438.78		
Balance, assets over liabilities, Dec. 31, 1901 .....	4,110,345.00		
			7,206,678.08

TABLE NO. 1.—*Comparative statement of operating expenses of railroad for the years ending December 31, 1900 and 1901.*

Expenses.	1901.	1900.
<b>GENERAL EXPENSES ON THE ISTHMUS.</b>		
Advertising.....	\$8.21	\$15.12
Cablegrams.....	415.33	174.45
Hospital service.....	7,576.73	7,997.57
Legal expenses.....	2,485.74	2,574.93
Salaries of officers.....	11,442.40	11,673.07
Salaries of clerks and attendants.....	12,516.09	12,725.58
Office expenses, stationery, and printing.....	2,408.12	2,370.98
Other expenses.....	3,525.58	2,684.55
<b>Total.....</b>	<b>40,378.20</b>	<b>40,216.25</b>
<b>CONDUCTING TRANSPORTATION.</b>		
Advertising.....	1,288.04	1,256.72
Clearing wrecks.....	133.00	72.46
Engineers and firemen.....	29,176.58	28,446.97
Fuel for locomotives.....	44,345.99	32,882.58
Injuries to persons.....	749.08	5,512.70
Labor—Colon and Panama stations.....	126,854.26	101,502.83
Oil, tallow, waste, and other supplies for locomotives.....	2,779.02	1,637.78
Roundhouse men.....	8,211.89	6,885.62
Superintendence and clerks.....	4,352.13	8,872.24
Switchmen, yardmen, and yard watchmen.....	38,257.21	27,883.17
Station agents and clerks.....	66,696.42	60,696.99
Station supplies and expenses.....	17,146.25	12,402.50
Stationery and printing.....	8,706.24	2,564.58
Train conductors, baggagemen, flagmen, and brakemen.....	18,295.34	14,371.82
Train supplies and expenses.....	8,310.25	2,717.57
Telegraph expenses.....	8,726.72	8,228.96
Water supply for locomotives.....	3,529.13	3,230.02
Other expenses.....	1,961.83	1,351.97
<b>Total.....</b>	<b>373,022.88</b>	<b>309,516.83</b>
<b>MAINTENANCE OF EQUIPMENT.</b>		
Repairs of freight cars.....	60,266.15	51,307.00
Repairs of locomotives.....	24,216.16	30,986.38
Repairs of passenger cars.....	9,496.86	7,459.23
Repairs and renewals of shop machinery and tools.....	10,097.15	15,648.60
Superintendence and clerks.....	12,230.32	10,882.82
Stationery and printing.....	213.69	234.84
<b>Total.....</b>	<b>116,519.83</b>	<b>116,518.87</b>
<b>MAINTENANCE OF WAY AND STRUCTURES.</b>		
Repairs of bridges and culverts.....	12,493.24	23,862.66
Repairs and renewal of general offices.....	1,300.36	2,124.76
Repairs of road machinery and tools.....	2,317.79	2,208.68
Repairs of roadway and track.....	19,920.74	23,607.76
Renewals of switches and frogs.....	1,140.31	987.41
Renewals of spikes and rail fastenings.....	3,078.69	4,606.06
Repairs and renewal of station buildings.....	22,139.03	3,178.54
Repairs of shop buildings, water and fuel stations.....	14,028.64	5,200.99
Repairs of section houses, tool houses, etc.....	656.22	231.11
Renewal of ties.....	2,971.13	13,758.36
Repairs of telegraph.....	2,423.26	1,691.23
Removal of weeds, brush, grass, etc.....	8,984.01	6,732.29
Superintendence and clerks.....	8,307.27	7,394.20
Stationery and printing.....	261.13	204.86
Other expenses.....	369.80	29.69
<b>Total.....</b>	<b>95,341.62</b>	<b>95,810.60</b>

TABLE NO. 2.—Comparative statement of expenses of steamship line, Atlantic service, for years ending December 31, 1900 and 1901.

Expenses.	1901.	1900.
<b>STEAMER EXPENSES.</b>		
Port charges:		
Custom-house entrance, clearance and consular fees, etc.	\$15,279.23	\$12,758.83
Pilotage.....	7,351.68	6,620.89
Quarantine.....	938.00	979.00
Total.....	23,569.11	20,358.72
Docking.....	1,163.68	3,426.29
Equipment, deck, engine, and commissary departments	10,628.16	10,889.11
Fuel.....	111,430.11	89,512.67
Feeding passengers and crew.....	62,894.06	55,273.69
Insurance.....	22,760.53	22,728.10
Labor on cargo.....	121,278.24	121,072.88
Labor on coal.....	14,336.98	12,196.91
Labor on ashes.....	1,435.00	1,291.00
Loss and damage.....	6,038.14	5,184.06
Oil and waste.....	2,167.42	1,523.80
Painting ships' bottoms.....	1,403.00	2,815.04
Repairs, deck, engine, and commissary departments	44,708.34	84,431.85
Stores, deck, engine, commissary, and surgeon's departments	12,462.84	12,762.55
Stationery and printing.....	875.98	430.46
Telegrams and cables.....	1,205.78	1,463.54
Towage.....	1,484.80	1,535.30
Wages.....	130,331.36	116,964.22
Water.....	12,578.43	11,453.53
Washing.....	1,772.11	1,227.37
Other expenses.....	1,333.38	1,856.37
Total.....	585,877.45	576,891.96
<b>AGENCY EXPENSES.</b>		
Advertising.....	2,669.30	2,885.15
Insurance.....	1,759.21	1,307.86
Labor.....	16,645.71	17,374.27
Office expenses.....	5,962.49	7,126.75
Repairs and rent of offices and wharves	57,348.51	55,815.73
Salaries of agents and clerks.....	29,298.42	29,546.51
Stationery and printing.....	1,443.80	1,486.61
Taxes.....	1,000.03	960.00
Other expenses.....	1,035.34	686.79
Total.....	117,202.81	116,689.67

TABLE NO. 3.—Comparative statement of general expenses, New York, for years ending December 31, 1900 and 1901.

Expenses.	1901.	1900.
<b>GENERAL EXPENSES, NEW YORK.</b>		
Advertising.....	\$1,728.59	\$1,659.64
General office expenses.....	6,615.74	9,765.18
Legal services and expenses.....	9,149.82	8,246.30
Salaries of general officers and clerks and directors' and committees' fees.....	70,271.60	73,784.66
Stationery and printing.....	1,181.23	1,341.20
Telegrams and cablegrams.....	1,620.07	2,199.83
Other expenses.....	1,074.93	3,141.81
Total.....	91,641.98	100,178.62

TABLE NO. 4.—*Comparative statement of expenses of steamship line, Pacific service, for years ending December 31, 1900 and 1901.*

Expenses.	1901.	1900.
<b>STEAMER EXPENSES.</b>		
Port charges:		
Custom-house, entrance, clearance, consular fees, etc.	\$1,167.21	\$28.00
Pilotage	5,645.68	169.64
Total	6,812.89	197.64
Equipment, deck, engine, and commissary departments.	3.00	3.00
Fuel	99,486.83	2,728.99
Feeding passengers and crew	9,576.78	
Labor on cargo	68,673.96	564.75
Labor on coal	5,953.26	153.05
Labor on ashes	27.50	3.00
Loss and damage	4,853.93	
Repairs, deck, engine, and commissary departments	16.98	
Stores, deck, engine, commissary, and surgeon's departments	2,211.27	122.78
Stationery and printing	229.30	
Telegrams and cables	385.58	
Towage	472.50	
Wages	2,981.85	
Water	10,034.95	27.90
Other expenses	175.77	
Total	211,896.34	3,801.11
<b>AGENCY EXPENSES.</b>		
Advertising	1,207.15	8.92
Labor	9,413.85	
Office expenses	1,865.03	
Repairs and rent of offices and wharves	82,596.57	
Salaries of agents and clerks	15,832.88	
Stationery and printing	713.74	
Taxes	3.25	
Other expenses	666.42	
Total	111,798.89	8.92

TABLE NO. 5.—*Number of tons of freight moved on the railroad.*

(1) FROM ALL POINTS TO ALL POINTS.

	1901.	1900.	Increase.	Decrease.
<b>COLON TO PANAMA.</b>				
	<i>Tons.</i>	<i>Tons.</i>	<i>Per cent.</i>	<i>Per cent.</i>
From New York to San Francisco	43,455	33,555	29.50	
From New York to Panama, South Pacific, Central America, and Mexico	28,455	26,963	5.58	
From Europe to Panama, South Pacific, Central America, Mexico, and San Francisco	61,972	54,905	12.87	
From Colon to Panama (local):				
Commercial freight	27,699	16,217	70.80	
Company's freight	34,162	22,118	54.45	
Total	195,743	153,758	27.31	
<b>PANAMA TO COLON.</b>				
From San Francisco to New York	42,086	30,624	37.43	
From South Pacific, Central America, Mexico, and Panama to New York	59,651	88,046		32.25
From South Pacific, Central America, Mexico, San Francisco, and Panama to Europe	79,388	77,219	2.81	
From Panama to Colon (local):				
Commercial freight	2,883	3,198		9.85
Company's freight	5,833	4,582	28.71	
Total	189,841	208,619		6.77
Total east bound and west bound	385,584	357,377	7.89	

TABLE NO. 5.—Number of tons of freight moved on the railroad—Cont'd.

(2) COUNTRIES OF ORIGIN AND DESTINATION.

	1901.	1900.	Increase.	Decrease.
<b>COLON TO PANAMA.</b>				
	<i>Tons.</i>	<i>Tons.</i>	<i>Per cent.</i>	<i>Per cent.</i>
For Panama .....	71,151	47,381	50.17	.....
For Central America.....	28,252	27,409	3.08	.....
For South Pacific.....	48,065	40,936	17.46	.....
For San Francisco.....	45,434	35,374	28.44	.....
For Mexico.....	2,821	2,658	6.13	.....
Total.....	195,743	153,768	27.31	.....
<b>PANAMA TO COLON.</b>				
From Panama .....	25,814	30,009	.....	13.93
From Central America.....	40,128	48,283	.....	16.89
From South Pacific.....	80,318	93,511	.....	14.11
From San Francisco.....	42,552	30,628	38.93	.....
From Mexico.....	1,029	1,188	.....	13.38
Total.....	189,841	203,619	.....	6.77
Total east bound and west bound.....	385,584	357,377	7.89	.....

TABLE NO. 6.—Statement showing number of tons of freight transported during the years 1897, 1898, 1899, 1900, and 1901.

Month.	1897.	1898.	1899.	1900.	1901.
	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>
January.....	26,886	23,708	29,204	29,115	38,264
February.....	31,587	29,993	20,883	30,947	32,909
March.....	32,539	32,234	32,838	33,177	34,271
April.....	33,978	25,899	32,575	33,381	41,159
May.....	30,420	18,007	27,654	29,670	36,715
June.....	20,962	17,108	21,098	25,236	26,889
July.....	20,368	16,906	18,827	25,982	29,919
August.....	17,004	18,373	17,645	22,415	20,554
September.....	16,929	15,816	19,357	27,894	35,984
October.....	21,073	22,146	19,871	29,320	23,814
November.....	19,435	22,581	23,306	36,754	34,406
December.....	19,470	26,385	24,143	33,486	30,700
Total.....	290,651	268,156	287,400	357,377	385,584



TABLE NO. 7.—*Statement showing number of passengers transported during the years 1900 and 1901.*

Month.	To Panama.			To Colon.		
	First class.	Second class.	Total.	First class.	Second class.	Total.
January.....	232	3,867	4,099	172	3,633	3,805
February.....	194	3,535	3,729	169	3,510	3,679
March.....	175	3,836	4,011	180	3,922	4,102
April.....	222	4,514	4,736	227	4,175	4,402
May.....	203	4,313	4,516	275	3,852	4,127
June.....	229	3,963	4,192	287	4,387	4,674
July.....	228	3,710	3,938	204	3,605	3,809
August.....	155	3,089	3,244	155	3,075	3,230
September.....	203	2,943	3,146	167	2,845	3,012
October.....	212	2,731	2,943	111	2,771	2,882
November.....	215	2,976	3,191	109	2,948	3,057
December.....	154	3,090	3,244	109	3,284	3,393
Total.....	2,422	42,567	44,989	2,165	42,007	44,172
89,161						

1900.						
January.....	178	2,284	2,462	152	2,794	2,946
February.....	260	2,226	2,486	264	2,736	3,000
March.....	211	3,025	3,236	283	3,354	3,617
April.....	269	3,224	3,493	447	3,538	3,985
May.....	205	2,846	3,051	420	3,091	3,511
June.....	174	3,169	3,343	247	3,183	3,430
July.....	186	3,058	3,244	257	3,236	3,493
August.....	185	3,148	3,333	153	3,525	3,678
September.....	200	3,250	3,450	182	3,060	3,242
October.....	256	4,885	5,141	241	3,167	3,408
November.....	272	3,670	3,942	154	3,126	3,280
December.....	279	4,196	4,475	135	3,851	3,986
Total.....	2,675	38,991	41,656	2,915	38,661	41,576
83,232						

TABLE NO. 8.—*Comparative statement of local and through freight transported from Colon to Panama during the years 1900 and 1901.*

Month.	Local from Colon to Panama and way stations.		Through from Europe to all destinations.		Through from New York to all destinations.		Total.	
	1901.	1900.	1901.	1900.	1901.	1900.	1901.	1900.
	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>
January.....	4,918	2,221	6,304	6,178	8,032	5,252	19,254	13,651
February.....	3,837	4,420	4,245	3,623	5,709	2,788	13,971	10,831
March.....	4,803	3,689	6,181	3,272	6,685	5,362	17,669	12,323
April.....	8,285	7,422	5,352	4,357	8,577	4,585	22,214	16,364
May.....	4,108	2,256	5,148	3,403	6,274	6,210	15,530	11,875
June.....	3,033	2,292	4,190	4,184	5,547	3,835	12,770	10,311
July.....	2,237	1,766	5,574	4,230	6,516	4,928	14,327	10,924
August.....	1,979	2,035	3,896	3,511	4,575	3,890	10,450	9,436
September.....	11,441	2,319	4,404	4,428	4,695	4,642	20,540	11,389
October.....	3,796	1,296	6,132	5,600	5,310	5,601	15,238	12,497
November.....	6,653	6,521	4,894	5,432	5,281	7,398	16,828	19,351
December.....	6,771	2,098	5,652	6,681	4,709	6,027	17,132	14,806
Total.....	61,861	38,335	61,972	54,905	71,910	60,518	196,743	153,758

TABLE No. 9.—Comparative statement of local and through freight transported from Panama to Colon during the years 1900 and 1901.

Month.	Local from Panama to Colon and way stations.		Through from all points to Europe.		Through from all points to New York.		Total.	
	1901.	1900.	1901.	1900.	1901.	1900.	1901.	1900.
	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>	<i>Tons.</i>
January.....	859	459	11,081	9,157	7,070	5,848	19,010	15,464
February.....	685	847	9,504	10,207	8,929	9,062	19,118	20,116
March.....	889	921	10,303	11,001	5,410	8,932	16,602	20,854
April.....	1,169	1,100	9,974	9,433	7,802	6,484	18,945	17,017
May.....	567	606	10,242	6,784	10,376	10,406	21,185	17,795
June.....	489	681	6,307	4,761	7,323	9,493	14,119	14,925
July.....	545	601	3,489	4,040	11,558	10,417	15,592	15,068
August.....	571	591	3,381	3,484	6,152	8,904	10,104	12,979
September.....	601	509	2,652	3,460	12,191	12,536	15,444	16,505
October.....	733	486	4,322	3,676	3,521	12,661	8,576	16,823
November.....	667	486	3,733	3,257	13,178	13,660	17,578	17,403
December.....	941	444	4,400	7,959	8,227	10,277	13,568	18,680
Total.....	8,716	7,730	79,388	77,219	101,737	118,670	189,841	203,619

TABLE No. 10.—Statement of interest and exchange.

Debits.	1901.	1900.	Credits.	1901.	1900.
Miscellaneous interest and exchange items.....	\$88.50	\$96.80	Interest on deposits with trust companies and London bankers.....	\$11,259.83	\$24,557.74
Loss on exchange—New York, London, and Isthmus drafts.	2,450.32		Interest on bonds in treasury.....	14,350.00	15,876.26
Balance, net receipts.	86,215.28	47,738.93	Discount on prepayment of sundry accounts.....	2,982.52	2,242.64
			Miscellaneous interest.....	412.37	2,111.09
			Profit on exchange, New York, London, and Isthmus drafts.....		3,047.01
			Interest on advances for construction La Boca terminal.....	59,749.38	
	88,754.10	47,834.73		88,754.10	47,834.73

TABLE No. 11.—Statement of operating expenses of railroad (by months) for the year 1901.

	January.	February.	March.	April.
General expenses on Isthmus.....	\$2,954.98	\$3,210.11	\$3,344.16	\$3,108.98
Conducting transportation.....	31,557.33	31,017.90	31,554.11	31,941.68
Maintenance of equipment.....	9,377.05	9,380.90	13,500.34	9,150.87
Maintenance of way and structures.....	5,546.78	5,035.08	8,308.77	6,119.86
Total.....	49,436.14	48,643.94	56,707.38	50,321.39

TABLE NO. 11.—*Statement of operating expenses of railroad (by months) for the year 1901—Continued.*

	May.	June.	July.	August.
General expenses on Isthmus.....	\$3,130.62	\$3,554.98	\$3,660.25	\$3,888.91
Conducting transportation.....	35,163.51	30,829.76	30,106.80	29,246.87
Maintenance of equipment.....	10,358.46	11,254.50	14,059.43	11,458.15
Maintenance of way and structures.....	11,428.28	9,023.49	7,397.09	10,524.99
Total.....	60,080.87	54,662.73	55,223.57	55,118.92

	September.	October.	November.	December.	Total.
General expenses on Isthmus.....	\$3,087.20	\$3,205.73	\$3,687.86	\$3,544.42	\$40,378.20
Conducting transportation.....	30,509.00	30,669.86	30,580.49	29,445.57	373,022.88
Maintenance of equipment.....	11,742.52	9,590.26	14,863.69	11,511.04	116,519.83
Maintenance of way and structures.....	5,547.89	12,325.43	7,478.45	6,608.56	95,341.62
Total.....	50,886.61	55,791.28	55,999.99	51,109.59	625,262.53

a Credit.

TABLE NO. 12.—*Statement of operating expenses of the Panama Railroad Steamship Line, Atlantic service (by months), for the year 1901.*

	January.	February.	March.	April.
Steamer expenses.....	\$51,868.23	\$43,765.84	\$43,080.89	\$57,600.41
Agency expenses.....	9,633.83	9,422.73	9,268.39	9,807.28
Charter of steamers.....	27,509.38	12,600.00	13,950.00	13,500.00
Total.....	89,011.44	65,788.57	66,299.28	80,907.69

	May.	June.	July.	August.
Steamer expenses.....	\$51,738.88	\$43,541.58	\$49,078.04	\$44,193.24
Agency expenses.....	11,542.86	10,956.15	9,079.15	9,753.81
Charter of steamers.....	13,950.00	11,150.00	7,300.00	17,160.00
Total.....	77,231.74	65,647.73	65,457.19	71,107.05

	September.	October.	November.	December.	Total.
Steamer expenses.....	\$51,640.12	\$48,216.64	\$46,507.18	\$54,646.40	\$585,877.45
Agency expenses.....	8,838.30	9,585.10	9,402.19	9,913.02	117,202.81
Charter of steamers.....	8,100.00	7,800.00	17,200.00	14,710.00	164,929.38
Total.....	68,578.42	65,601.74	73,109.37	79,269.42	868,009.64

TABLE NO. 13.—Statement of operating expenses of the Panama Railroad Steamship Line, Pacific service (by months), for the year 1901.

	January.	February.	March.	April.
Steamer expenses.....	\$20,159.18	\$19,415.45	\$20,878.87	\$20,560.88
Agency expenses.....	6,985.12	11,136.39	8,928.81	11,062.14
Charter of steamers.....	19,600.00	28,000.00	31,000.00	31,251.00
Total.....	46,744.25	58,551.84	60,805.18	62,874.02

	May.	June.	July.	August.
Steamer expenses.....	\$15,153.33	\$16,996.63	\$13,172.48	\$18,954.66
Agency expenses.....	6,710.84	12,158.41	7,557.91	6,734.90
Charter of steamers.....	21,033.33	17,250.00	17,825.00	23,450.00
Total.....	42,897.50	46,405.04	38,555.39	49,139.56

	September.	October.	November.	December.	Total.
Steamer expenses.....	\$14,437.17	\$24,636.37	\$17,406.42	\$14,809.32	\$216,580.21
Agency expenses.....	14,170.35	6,828.88	16,529.24	2,997.90	111,798.89
Charter of steamers.....	18,375.00	31,100.00	22,950.00	17,825.00	279,659.33
Total.....	46,982.52	62,565.25	56,885.66	35,632.22	608,038.43

TABLE NO. 14.—Statement of earnings of railroad (by months) for the year 1901.

	January.	February.	March.	April.
Freight, Colon to Panama.....	\$58,742.64	\$41,907.31	\$51,109.80	\$60,382.97
Freight, Panama to Colon.....	65,965.77	63,792.77	60,819.67	60,893.13
Passengers, Colon to Panama.....	3,659.75	2,920.29	2,978.49	3,533.29
Passengers, Panama to Colon.....	2,720.77	2,629.22	2,869.16	3,481.59
Mails, Colon to Panama.....	4,404.48	3,800.05	4,577.59	4,238.32
Mails, Panama to Colon.....	517.14	391.12	333.01	415.41
Treasure, Colon to Panama.....	628.89	424.05	338.72	350.16
Treasure, Panama to Colon.....	1,257.28	1,150.72	1,580.15	1,122.48
Extra baggage, Colon to Panama.....	796.44	537.34	625.81	1,055.46
Extra baggage, Panama to Colon.....	506.40	604.17	545.36	557.86
Total.....	139,199.56	118,157.04	125,677.76	136,090.66

	May.	June.	July.	August.
Freight, Colon to Panama.....	\$46,728.24	\$41,066.38	\$50,939.19	\$36,491.97
Freight, Panama to Colon.....	67,587.31	42,111.34	42,522.62	29,237.92
Passengers, Colon to Panama.....	4,959.05	3,209.63	3,369.57	2,613.21
Passengers, Panama to Colon.....	3,825.18	4,371.16	3,448.23	2,504.78
Mails, Colon to Panama.....	4,193.35	4,191.55	5,210.85	3,918.79
Mails, Panama to Colon.....	340.53	418.09	362.72	322.29
Treasure, Colon to Panama.....	358.22	167.18	314.13	322.45
Treasure, Panama to Colon.....	1,266.34	1,199.78	869.98	1,473.45
Extra baggage, Colon to Panama.....	830.50	1,054.60	872.49	407.60
Extra baggage, Panama to Colon.....	910.40	751.11	799.08	584.02
Total.....	130,999.12	98,540.82	108,699.86	77,759.48

TABLE NO. 14.—*Statement of earnings of railroad (by months) for the year 1901—Continued.*

	Septem-ber.	October.	Novem-ber.	Decem-ber.	Total.
Freight, Colon to Panama.....	\$56, 678. 49	\$51, 265. 39	\$54, 176. 09	\$54, 702. 18	\$206, 186. 65
Freight, Panama to Colon.....	39, 287. 97	27, 582. 42	50, 969. 84	39, 858. 31	500, 624. 07
Passengers, Colon to Panama.....	2, 832. 06	2, 936. 68	3, 608. 09	2, 625. 71	39, 236. 81
Passengers, Panama to Colon.....	2, 741. 51	2, 362. 49	2, 630. 66	2, 838. 12	36, 417. 87
Mails, Colon to Panama.....	3, 776. 64	4, 676. 47	4, 468. 85	4, 742. 14	52, 254. 08
Mails, Panama to Colon.....	514. 22	430. 13	335. 64	400. 17	4, 780. 47
Treasure, Colon to Panama.....	217. 81	349. 63	321. 83	506. 70	4, 182. 77
Treasure, Panama to Colon.....	1, 611. 28	1, 047. 28	964. 36	791. 02	14, 334. 07
Extra baggage, Colon to Panama.....	1, 119. 90	817. 14	1, 060. 27	617. 85	9, 695. 40
Extra baggage, Panama to Colon.....	598. 65	538. 63	474. 94	569. 76	7, 460. 37
Total.....	111, 373. 52	92, 006. 21	119, 005. 67	107, 661. 96	1, 365, 171. 56

TABLE NO. 15.—*Statement of earnings of the Panama Railroad Steamship Line, Atlantic service (by months), for the year 1901.*

	January.	February.	March.	April.	
Freight .....	\$62,091.18	\$49,633.01	\$56,857.32	\$74,414.20	
Treasure .....	602.62	433.55	430.38	873.28	
Mails .....	7,381.14	5,769.87	6,340.50	7,405.45	
Extra baggage .....	113.48	161.15	144.17	159.35	
Passengers .....	12,609.10	9,297.65	8,601.59	15,433.34	
Miscellaneous .....	530.83	409.69	490.67	802.54	
Total.....	83,328.35	65,704.92	72,864.63	99,088.16	
	May.	June.	July.	August.	
Freight .....	\$60,946.37	\$62,306.88	\$61,898.59	\$63,596.22	
Treasure .....	209.42	358.48	340.23	278.19	
Mails .....	5,916.67	6,088.39	7,717.35	5,898.66	
Extra baggage .....	192.75	179.11	220.79	137.23	
Passengers .....	14,063.89	15,181.82	18,222.72	12,178.35	
Miscellaneous .....	785.21	639.50	918.28	497.80	
Total.....	82,114.31	84,754.18	89,313.01	82,586.65	
	September.	October.	November.	December.	Total.
Freight.....	\$40,827.94	\$60,042.80	\$58,234.10	\$67,759.27	\$718,607.88
Treasure .....	371.19	590.79	197.06	266.41	4,951.65
Mails .....	5,441.73	7,322.61	6,046.36	7,686.90	79,015.83
Extra baggage .....	220.65	171.07	276.21	210.73	2,196.69
Passengers .....	10,984.76	14,202.25	13,694.18	10,101.93	154,571.58
Miscellaneous .....	516.45	532.78	608.20	790.26	7,517.21
Total.....	58,362.72	82,862.30	79,056.11	86,815.50	966,850.84

TABLE No. 16.—Statement of earnings of the Panama Railroad Steamship Line, Pacific service (by months), for the year 1901.

	January.	February.	March.	April.	
Freight .....	\$18,476.00	\$21,293.39	\$45,452.00	\$18,771.00	
Extra baggage .....	2.45	31.24	5.55	9.55	
Passengers .....	1,527.50	1,400.00	1,615.00	2,152.75	
Total .....	20,005.95	22,724.63	47,072.55	20,933.30	
	May.	June.	July.	August.	
Freight .....	\$23,610.28	\$37,557.80	\$13,857.42	\$41,427.72	
Extra baggage .....	13.75	1.35	2.25	9.25	
Passengers .....	1,070.00	1,837.50	1,080.00	875.00	
Total .....	29,694.03	39,396.65	14,939.67	42,311.97	
	September.	October.	November.	December.	Total.
Freight .....	\$20,562.72	\$53,575.12	\$11,513.55	\$38,180.33	\$349,277.33
Extra baggage .....	7.35	25.29	12.15		120.18
Passengers .....	1,250.00	1,495.00	602.50	1,520.00	16,425.25
Total .....	21,820.07	55,095.41	12,128.20	39,700.33	365,822.76

TABLE No. 17.—Comparative statement of vessel entries during the years 1900 and 1901, Colon Harbor.

Month.	Sailing vessels.				Steamers.				Total.			
	1901.		1900.		1901.		1900.		1901.		1900.	
	Number.	Tons.	Number.	Tons.	Number.	Tons.	Number.	Tons.	Number.	Tons.	Number.	Tons.
January .....	27	1,014	56	1,113	38	97,545	31	88,137	65	98,559	87	89,250
February .....	28	948	42	965	25	50,755	29	89,692	53	51,703	71	90,657
March .....	36	402	43	689	33	100,658	33	95,693	69	101,060	76	96,382
April .....	42	1,117	50	696	33	104,964	31	90,940	75	106,081	81	91,636
May .....	34	570	54	652	33	93,403	31	89,849	67	88,973	85	90,501
June .....	42	618	50	1,422	27	76,706	28	73,444	69	77,323	78	74,566
July .....	34	484	34	615	32	93,314	31	95,406	66	93,798	65	96,081
August .....	33	313	36	721	27	71,759	28	72,035	60	72,072	64	72,756
September .....	33	647	39	1,119	29	77,814	27	74,618	62	78,461	66	75,737
October .....	34	725	46	630	31	95,757	29	80,462	65	96,483	75	81,092
November .....	28	971	54	1,461	35	87,276	28	78,715	63	88,247	82	80,176
December .....	27	700	39	532	30	100,680	29	84,384	57	101,380	68	84,916
Total .....	398	8,510	543	10,615	373	1,050,630	355	1,013,135	771	1,059,140	898	1,023,750

TABLE NO. 18.—*Comparative statement of vessel entries during the years 1900 and 1901, port of Panama.*

Month.	Steamers.				Total.			
	1901.		1900.		1901.		1900.	
	No.	Tons.	No.	Tons.	No.	Tons.	No.	Tons.
January .....	17	26,588	20	28,486	17	26,588	20	28,486
February .....	18	27,688	22	31,544	18	27,688	22	31,544
March .....	20	28,223	21	33,633	20	28,223	21	33,633
April .....	17	26,157	19	26,179	17	26,157	19	26,179
May .....	20	27,481	17	26,476	20	27,481	17	26,476
June .....	16	20,391	19	23,738	16	20,391	19	23,738
July .....	17	23,687	15	23,594	17	23,687	15	23,594
August .....	18	22,215	14	18,378	18	22,215	14	18,378
September .....	21	27,673	18	26,673	21	27,673	18	26,673
October .....	17	23,475	21	30,840	17	23,475	21	30,840
November .....	19	27,088	19	29,103	19	27,088	19	29,103
December .....	16	21,899	21	29,196	16	21,899	21	29,196
Total .....	216	302,510	226	327,842	216	302,510	226	327,842

TABLE NO. 19.—*Rolling stock equipment.*

	Locomotives.		Passenger cars.				
	Road engines.	Switch engines.	Special.	First class.	Composite first and second classes.	Second class.	Baggage.
Stock on Dec. 31, 1901 .....	24	11	5	8	2	9	7
Stock on Dec. 31, 1900 .....	24	11	5	8	2	9	7
Decrease during the year .....							

	Freight cars.			Miscellaneous.								
	Box.	Coal.	Flat.	Local express.	Wrecking.	Caboose.	Specie.	Water.	Stock.	Road department.	Movable steam crane.	Steam pile driver.
Stock on Dec. 31, 1901 .....	582	136	186	27	1	5	2	9	9	2	1	1
Stock on Dec. 31, 1900 .....	582	136	186	27	1	5	2	9	9	2	1	1
Decrease during the year .....											1	

TABLE No. 20.—*Floating equipment.*

Name.	Gross tonnage.	Length.	Breadth.	Depth.	Hull.	Passenger accommodation.	
						Cabin.	Steerage.
		<i>Fect.</i>	<i>Ft. in.</i>	<i>Ft. in.</i>			
Steamship Alliance...	2,985	308	42 0	23 9	Iron	82	66
Steamship Advance...	2,606	295	38 4	23 4	do	64	66
Steamship Finance...	2,608	300	38 4	23 6	do	64	62
Tug Ancon	106	98	18 0	6 0	do		
Tug Bolivar	234	127	23 0	9 6	do		
4 freight lighters	340	110	24 2	7 2	Steel		
14 freight lighters	230 to 300	110	24 0	6 6	Iron		
2 coal lighters	215	100	24 0	6 0	do		
1 floating pile driver		60	30 0	5 0	Wood		

## EXHIBIT T.

## OFFICIAL PROPOSAL OF SALE TO THE UNITED STATES.

[New Panama Canal Company, Anonymous Association, capital 65 millions; company headquarters 7 rue Louis-le-Grand.]

Taken from the record of the deliberations of the council of administration.

Session of January 9, 1902.

Present: MM. Bo, president,

Monvoisin, vice-president,

Terrier, vice-president,

Bourgeois, administrator,

Couvreux, administrator,

Forot, administrator,

Gueydan, administrator,

Le Baron de Lassus St. Genies, administrator,

Georges Martin, administrator.

The council decides unanimously to make an offer at a fixed price for the cession to the Government of the United States of all the properties and rights which the New Company possesses on the Isthmus, without any exception, for \$40,000,000, and it delegates to its president, M. Bo, all powers to transmit that offer, and effect and sign the said cession.

Copy conforming with the original.

M. Bo,

*President of the Council of Administration.*

[Telegram addressed to Admiral Walker, January 9, 1902.]

The New Panama Canal Company declares that it is ready to accept for the whole of its properties and rights on the isthmus, without exception, the sum of \$40,000,000. This offer good up to March 4, 1903.

Bo,

*President of the Council of Administration.*

Certified to be in conformity with the original.

Bo,

*President of the Council of Administration.*



[Telegram addressed to Admiral Walker, January 11, 1902.]

The offer of cession of all our properties comprises also all plans and archives at Paris.

Bo,

*President of the Council of Administration.*

Certified to be in conformity with the original.

Bo,

*President of the Council of Administration.*

[New Panama Canal Company, Anonymous Association, capital 65 millions, company headquarters 7, rue Louis-le-Grand.]

Taken from the report of the ordinary general meeting of stockholders of the New Panama Canal Company, held December 21, 1901, in the hall of the Association of Agriculturists of France, 8 rue d'Athènes, Paris.

Saturday, December 21, 1901, at 2.30 p. m.

The stockholders of the New Panama Canal Company, an anonymous association, with a capital of 65,000,000 francs, having its headquarters at Paris, 7 rue Louis-le-Grand,

Having met in ordinary general assembly at Paris, in the hall of the Association of Agriculturists of France, 8 rue d'Athènes, in consequence of a call inserted in the general journal of announcements, issue of Friday, November 29, 1901, called "Little Announcements" (*Petites Affiches*), M. Bo, vice-president of the company, presiding,

The president announces that the roll of those present, signed by each stockholder upon entering, shows the presence of 227 stockholders, representing either for themselves or as proxies 592,304 shares, giving a right to 7,523 votes, to wit, more than half of the company capital; that in consequence the meeting, being legally constituted, can validly deliberate.

He places upon the table the stamped copy, recorded and authenticated, of the number of the *Petites Affiches* of November 29 aforesaid.

Afterwards the president invites to assist him two of the principal stockholders present:

M. Jean Pierre Gautron, judicial administrator, in the name of and as liquidator of the Universal Company of the Interoceanic Canal of Panama, having headquarters at Paris, 42 Rue de la Chaussee d'Antin; and M. Uribe, residing at Paris, 12 Rue de Bassano, consul-general of the Republic of Colombia, specially accredited to represent his Government at the meeting,

The liquidation of the Universal Company of the Interoceanic Canal of Panama, being owner of 158,655 shares, and the Government of the Republic of Colombia of 50,000 shares.

MM. Gautron and Uribe accept the functions of examiners and take their places at the table.

The president and examiners designate as secretary of the meeting, M. Edouard Lampre, residing at Paris, 39 Boulevard Berthier, who accepts.

The bureau being thus constituted, certifies the list of those present.

\* \* \* \* \*

SECOND RESOLUTION.

The general meeting, after having heard the report of its council of administration, approves the conclusions of that report and gives all powers to its council of administration to negotiate the cession of the properties, concessions, privileges, etc., of the company, and to contract, with the reservation of ratification by the stockholders.

This resolution is adopted almost unanimously.

(Signed)

GAUTRON,  
*An Examiner.*

Bo,  
*The president.*  
JOSE PABLO URIBE,  
*An Examiner.*  
ED. LAMPRE,  
*The Secretary.*

Certified to be in conformity with the original.

Bo,  
*President of the Council of Administration.*

[New Panama Canal Company, Anonymous Association; Capital, 65 Millions; Company Headquarters, 7 Rue Louis-le-Grand.]

Taken from the report of the ordinary general meeting of stockholders of the New Panama Canal Company, held December 21, 1901, in the hall of the Association of Agriculturists of France, 8 Rue d'Athènes, Paris.

Saturday, December 21, 1901, at 2.30 p. m.

\* \* \* \* \*

THIRD RESOLUTION.

The general meeting ratifies the nominations of administrators made by the council of administration in pursuance of article 23 of the by-laws, of M. Rischmann to replace M. Rouget, of M. Forot to replace M. Hutin, and of M. Bourgois to replace M. Choron. It appoints, besides, M. Gueydan as administrator, who will make the tenth administrator, and decides, in conformity with article 22 of the by-laws, that four administrators instead of three shall be designated before the next general annual meeting, which will vote to replace or reelect them.

This resolution is adopted almost unanimously.

\* \* \* \* \*

The order of the day being accomplished, the session adjourns at 4 o'clock.

The faith of which there has been drawn up the present report, which is signed by the members of the bureau to serve and value as it lawfully may.

M. Bo,  
*The President.*  
P. GAUTRON,  
*An Examiner.*  
JOSE PABLO URIBE,  
*An Examiner.*  
ED. LAMPRE,  
*The Secretary.*

Certified to be in conformity with the original.

M. Bo,  
*President of the Council of Administration.*

## EXHIBIT U.

OPINION BY MAÎTRE DU BUIT AS TO JUDGMENT CREDITORS  
OF THE COMPAGNIE UNIVERSELLE

According to French law judgments, even for liquidated sums, obtained against a debtor, do not in themselves confer upon the creditor any right of preference or right to follow the property of the debtor.

These judgments carry with them a judicial lien upon all real estate (art. 2123 of the Civil Code); that is to say, they confer upon the creditor who obtained them the right to obtain a lien by an entry on the registers of liens of the place where the property is situated (art. 2134), but the lien affects the property only by virtue of the entry. Unless the claim sanctioned by the judgment is in its nature a claim preferred as to certain property or as to all property, the creditor can not obtain from the judgment or from the date of its entry any priority over claims, whether supported by executory instruments (judgments or notarial deeds) or not, whatever may be their earlier or later date. (Arts. 2093 and 2094.)

The existence of these judgments does not affect in any way the right of disposition, which continues to belong to the debtor; all alienations not made in fraud of creditors, are, therefore, valid, and transfer title to the purchasers (art. 1167), subject to the right of redemption in the case of conveyances of real estate.

The only effect of judgments is to allow the creditor who had no executory instrument, but only a private right, to levy upon and have sold, the property, personal and real, belonging to his debtor (art. 545, Code of Procedure, 583, 673); but this right, even when exercised, does not confer upon him any right of preference in the proceeds of the sale of the personal or real property upon which he has levied, and which he has had sold (arts. 2093, 2094, Civil Code). All other creditors of the same debtor, whether they hold executory instruments or not (art. 609, Code of Procedure), have the right to come in to share in the proceeds of sales made at the instance of the most diligent. It may even happen that in the distributions (art. 656 et seq. of the Code of Procedure) or in the orders (these latter are open, as to the price of real estate) (art. 749 et seq. of the Code of Procedure) which the court may make for the distribution of the price, the creditor making the levy may find himself confronted by creditors having a right to priority, and that he may be reduced, after the deductions made for them, to receiving only an insignificant share.

It will be seen, therefore, that the act of 1893 might, without violating any rule, and without disregarding any vested right, provide that the creditors (not mortgage creditors, moreover) of the Compagnie Universelle de Panama, which owned no real estate in France, should not have the right to enforce, themselves, judgments which they might have obtained before the promulgation of the act. In fact, these judgments would not have given, even in case they had enforced them by levy and judicial sale of certain property, any exclusive or preferential right to

the proceeds of these sales. These partial executions could only cause the most serious inconvenience, in that they would have paralyzed the liquidator, who alone could have made anything out of the principal asset, the canal concession; a levy upon and the sale of this concession in the ordinary way would, moreover—it might be feared, at least—destroy the value of the concession. Such is the purpose of the act of 1893 on this point. It deprives none of the creditors of the only right which French law recognizes in him, that of receiving his proportionate share of the assets of his debtor, the *Compagnie Universelle*. (Art. 2123 of the Civil Code.)

The Government of the United States, therefore, in case it should become the purchaser of the concession, would in no way have to concern itself with the creditors of the *Compagnie Universelle*, who had obtained judgments against it before the promulgation of the act. It has, moreover, been explained in the opinion that all rights of creditors of the *Compagnie Universelle* as to the concession and the rest of the assets of that company have been cleared away, so far as concerns the New Company and third parties who may become purchasers from it in future. (See art. 609, Code of Procedure: "Creditors can not intervene except upon the *price* of sale.") The rights of creditors, whatever they may be, have been transferred to the price of the sale made by the liquidator, in the form of a contribution to the company, so that third parties have nothing to do with any difficulties and competitions which may arise between creditors and the liquidator. If, contrary to the fact, it were even supposed that the holders of judgments against the *Compagnie Universelle* have thereby gained a better situation than that of the other bondholders or creditors, and would have a right to payment in full, this would still be only a right of preference *in the price*, and not a *right to follow*, affecting any part of the assets of the old *Compagnie Universelle*, as against outside purchasers. The question, which is wholly internal, would have no importance to third parties, especially to the Government of the United States, which would never have anything to fear from them.

Given at Paris, September 15, 1902.

(Signed)

H. Du BURT.

---

#### EXHIBIT V.

OPINION OF ME. WALDECK-ROUSSEAU, ADVOCATE OF THE COURT OF APPEALS OF PARIS, ON THE TITLE OF THE NEW PANAMA CANAL COMPANY TO ITS CONCESSIONS AND OTHER PROPERTY AND ITS POWER TO CONVEY A CLEAR TITLE TO THE UNITED STATES.

The questions submitted to the counsel undersigned are contained in a letter dated September 6, 1902, and are formulated as follows:

"I. Has the new Panama Canal Company a certain and absolute title to the property which it has offered for sale to the Government of the United States?

"II. Is this property in any measure legally encumbered by the debts and liabilities of the old company? In the event of the United States purchasing this property, would they, by so doing, become responsible for such debts and liabilities and would they thereby assume any kind of obligation to the shareholders, bondholders, or other creditors of the old company?"

"III. Is the act of July 1, 1893, unimpeachable and absolute, according to the Constitution and according to French law? Have the French judicial authorities power to discuss the validity of said act?"

IV. Is the New Panama Canal Company in any measure a government corporation in France, and is the cooperation of the French Government necessary for the transfer which the New Panama Canal Company proposes making to the Government of the United States?

V. Will the proposed transfer, duly carried out by deed of the New Panama Canal Company, and by deed of the liquidators of said company, the dissolution of which would be declared, place in the hands of the United States an absolute and unconditional title to the transferred property, without the United States assuming any of the obligations of the old company to the shareholders, bondholders, and other creditors of said company?

"Of course, the New Panama Canal Company, having made the transfer, will, without delay, fulfill all its obligations towards the liquidator of the old company, as they appear by the decision of the arbitrators dated February 11, 1902, made in execution of the contract dated December 24, 1901."

To answer these questions, it is necessary to refer to the private or judicial documents, the chain of which shows at once the nature of the Panama Canal concession and the various transfers of ownership of which it has been the subject. This historical review has been already presented with the greatest clearness and the most scrupulous accuracy in different opinions given either by Mes. Limbourg, Devin, Du Buit, Thiéblin et Gontard, counsel at the bar of Paris, or by Messrs. Sullivan & Cromwell, general counsel of the new company in America. As we shall have, in stating our opinion, to quote the exact text of the documents mentioned in these statements, it is enough, for brevity, to review generally the series of facts and instruments.

#### I.

The concession for the Interoceanic Panama Canal was obtained by M. Wyse. (Agreement of March 23, 1878—law 28 of 1878, of Colombia.)

Not only by its nature was it transferrable, but its transfer to a company by the concessionary and by this company to other companies or capitalists was expressly contemplated by article 21.

#### II.

It was, in the first place, to the Compagnie Universelle du Canal Interocéanique that the concession was transferred. This transfer is the subject of no criticism. It was made in consideration of certain

advantages granted to the transferrer. It is to be observed that everybody admits that, by the contribution made to the *Compagnie Universelle*, the latter became owner of the concession with all its advantages *without anyone's ever thinking of maintaining that the transferrer reserved any other rights than that of requiring the performance of the correlative advantages stipulated in the transfer.*

## III.

There is no need of reviewing the difficulties encountered by the *Compagnie Universelle*, or its financial vicissitudes. In 1889 it was driven to dissolution. Application was made to two jurisdictions—the one recognized in the company a commercial character, the other a civil character. It was the latter opinion which prevailed before the court of appeal, and it is the decree of the civil tribunal of the Seine of February 4, 1889, which *having become res judicata* governs the liquidation of the company.

## IV.

The same decree appointed the liquidator (M. Brunet), and in the enumeration of the powers of this liquidator mentions that of *transferring or contributing to any new company all or part of the corporate assets.* We shall say, further on, that this express statement was supererogatory, such an act, under French legislation and jurisprudence, *being by law* within the powers of the liquidator, since it is of the essence of his duties to realize upon the corporate assets. It should be added that, in this particular case, transfer by contribution to another company of assets of this sort was, in truth, the only possible way of realizing upon them, the property involved being not real estate or personal property of little importance, and already producing a return, but a colossal enterprise, to be carried out, and which could produce a return only after its completion.

## V.

It is unnecessary to review the modifications in the liquidation in consequence of death or other causes, and it is enough to observe that, if the person of the liquidator has changed, the powers of liquidation have remained the same.

## VI.

Nor do we think it necessary to enter into the details of the laws for extension of the concession in 1890, 1893, or 1900. They have, for the present opinion, no other importance—though this is considerable—than to show the approval given by Colombia to the transfer made by the *Compagnie Universelle* for the benefit of the new company.

## VII.

The new company was formed on October 20, 1894. In form, as in substance, it is a *private* company, formed under the general act of July

24, 1867, and that of August 1, 1893, like all commercial companies, and without connection with the Government. All the formalities prescribed acknowledgment of the articles of incorporation before a notary, subscription to the shares, payment of one-fourth of the shares, declaration of subscription and of the payment of one-fourth, meeting of the shareholders for organization, approval by a second meeting of the contributions, etc. *All legal formalities were fulfilled*, and the regularity as well as the validity of this company must be considered as beyond doubt.

#### VIII.

The articles of incorporation show the purpose of the company—the construction and operation of the canal; that is to say, the utilization of the concession of 1878 held by the liquidation of the *Compagnie Universelle*.

The purpose of the company could not be attained unless it became owner of the concession. The liquidator, authorized so to do by the decree of February 4, 1889, became a party to the articles in order to *contribute to the company*: First, this concession (*all rights whatever resulting for the benefit of the company in liquidation from the laws of the Government of Colombia of May 18, 1878, and December 26, 1890, etc.*); second, the works executed, yards, plant, etc.; third, the plans and estimates; fourth, the rights of every nature of the *Compagnie Universelle* relating to the Panama Railroad.

In a word, the liquidator contributes to the new company the original concession, without exception, and the increment resulting from its works of acquisitions.

#### IX.

In our law it is correct to say that contribution to a company is nothing else than a sale.<sup>a</sup> It is in essence a transfer of ownership. It may be stated that the numerous precautions taken by our legislation concerning commercial companies have for their principal purpose to inform the public of the assets, and so of the solvency, of the company formed, whence the publicity which must be given the articles of incorporation, and to guarantee the substantial character of the contribution and the correctness of its valuation, whence the appointment of commissioners

---

<sup>a</sup> V. Lyon Caen and Renault, *Traité de Droit Commercial*, t. II, No. 16:

“Ownership is transmitted, by the member who makes the contribution, to the association, when the latter constitutes a legal person, or becomes common to him and his fellow-members, when the association has no personality. In the former case ownership is entirely transferred; in the second transfer is made for the benefit of the other members only to the extent of the excess beyond the share assigned to the member who makes the contribution. The relation of the member by whom the contribution is made, to the company, or to his fellow-members (according to the distinction just stated), is analogous to the relation of a vendor to his purchaser.”

to report upon the value of the contributions and the verification by a shareholders' meeting, the majority of which is fixed by law.

Therefore to say contribution to a company is, by the same words, to say transfer of the ownership of the contribution for the benefit of the company.

#### X.

Certainly, the ownership contributed may be subject to incumbrances, *but only those which are enumerated in the document and made public are valid and may form the subject of any action at law.* Any reticence, any dissimulation, of a sort to modify the value of the contribution, and, consequently, the security of third parties, would be fraudulent, as tending to give a false idea of the credit of the company. In any case, it would be wholly inoperative, void, and nonexistent, and could not furnish a foundation for any action susceptible of being brought to their prejudice before the courts.

#### XI.

The only encumbrances which there can be upon the contribution made by the liquidator are, then, those enumerated in these articles:

First. The obligation of the new company to conform, with regard to the grantor, the Colombian Government, to the terms of the law of 1878 and that of 1890, and to pay all sums due by the *Compagnie Universelle* to that Government.

Second. The obligation to provide the *Compagnie Universelle* and the Government of Colombia certain limited advantages. Thus, the new company must pay over to the liquidator of the *Compagnie Universelle* 60 per cent of the net profits and issue to the Colombian Government, in conformity with the extension law of December 26, 1890, 50,000 full paid shares out of those issued to form the capital of the new company.

There is nothing in this part of the articles but a very ordinary and very normal method of compensation for the contribution. The contributor, in exchange for the property which he transfers to the company, may receive either a price in money, paid once for all, or an eventual interest, a share in the profits for example, resulting from the business, or full-paid shares; these are methods between which he may choose and which may be either modified or combined. He may then receive both an eventual interest and shares.

But in any case, and whatever may be the form of remuneration, this remuneration is the equivalent of the abandonment to the company of the contribution, and it falls within the rule that the contributor can not both receive the price stipulated for the thing transferred and retain all or any part of his ownership. The company acquires the ownership of the things contributed and the contributor loses it.

#### XII.

Among the assets of the liquidation were shares of the Panama Railroad. They were also transferred to the new company, but not absolutely, like



the other property. The transfer is *conditional*. If the canal is completed within the period by the new company, the latter becomes absolute owner of the shares. In the contrary case it must either restore the shares or pay for them by an indemnity of 20,000,000, the share of profits assigned to the liquidation being then fixed at 50 per cent.

## XIII.

It has been said that to contribute all the assets of the dissolved company to a new company was within the ordinary powers of the liquidator. This right had been expressly conferred upon the liquidator by the decree of 1889. The use which he made of it for the benefit of the new company has received the sanction of the act of July 1, 1893.

By recognizing a civil character in the *Compagnie Universelle* an almost inextricable situation had been created. In a civil liquidation there is not, as in a bankruptcy or a commercial liquidation, a *body* of creditors represented by a common representative; each of the creditors remains empowered to bring individually any suit, any claim; what is adjudged against or for him can neither bind nor benefit the rest. It was in order to apply to a civil liquidation, by virtue of a special provision, the methods of a commercial liquidation that the act of July 1 was passed. But it had to consider, at the same time that it ousted the creditors for the benefit of a representative, the protection of their interests in the liquidation. It devoted a title, title 2, to the liquidator. In articles 10 and 12 it expressly sanctions the right of transfer of the assets in the liquidator, and, while sanctioning it, surrounds it with new safeguards. *This transfer must be confirmed by the tribunal.* It, as well as the decree, shall be published in official form; intervention may be made upon the decree during the period of a month. When this period has passed, and when the decree has become final, having the authority of *res judicata*, the transfer can no longer be attacked by anyone.

Thus, and subject to judicial confirmation, the right which M. Gautron used in the formation of the new company is sanctioned at once by general law, the decree of February 4, 1884, the act of July 1, 1893.

## XIV.

The formalities prescribed by the act of July 1, 1893, were observed. The contribution made to the new company was the subject of a decree of confirmation of June 29, 1894. It was regularly published. There were interventions; they were overruled by a new decree of August 8, 1894. The right of the liquidator to make the transfer, as it appears in the articles of incorporation of the new company, without any other obligation than those expressed in the articles, is, therefore, *erga omnes*, sanctioned by the authority of *res judicata*, and can not be the subject of controversy in the courts.

## XV.

Article 75 of the articles of incorporation provides for the appointment of a technical commission, after the expenditure of about half of the

capital, for the purpose of making a report upon the possibility of completing the canal and the most suitable means for reaching that end. It was appointed on February 26, 1898, and made a report on February 23, 1899, in favor of the possibility of constructing the canal. By agreement between the liquidator and the company it was arranged that the meeting of the shareholders should not pass upon its conclusions until 1903.

We may therefore suppose that at that time the liquidator and the company were considering the advantage which would result for all from a new arrangement.

## XVI.

It was, in fact, at the commencement of 1901 that negotiations began with a view to the transfer of the canal to the United States. In case of transfer to the United States the nature of the assets of the liquidation would undergo a change. It possessed, before this transfer, an interest of 60 per cent; after the transfer it could claim in the proceeds of the property of the new company a share corresponding to the benefit which it would receive as a shareholder and from its interest in the company.

The liquidator, being of the opinion that this transaction might constitute, within the meaning of article 10 of the act of July 1, 1893, a realizing upon assets, complied with the provisions of that act. He presented an application on July 30, 1901, to be authorized to enter into an agreement with the new company on all questions which the United States might raise, the fixing of the price, and the setting off to the liquidation of its share in the proceeds of this sale.

A favorable decree was made on August 2, 1901. It has become final.

On December 24 an agreement, submitting possible controversies to arbitration, was signed by the liquidator and the new company, and gave the new company power to deal with the United States and to fix the price and terms of the transfer. On February 11 the arbitrators proceeded to make the adjustment which had devolved upon them.

This agreement of arbitration was confirmed by decree of March 19, 1902. The same decree authorized the transfer for \$40,000,000. There was an intervention. A decree of July 13, 1902, overruled this intervention. It was confirmed by a decision of August 5, 1902. Here, again, by virtue of the authority of *res judicata*, the authorization given by the liquidation to the new company to transfer to the United States, the mode of adjustment to be reached between these two parties, are so many *res judicatæ* which can no longer be the subject of a new action.

## XVII.

In truth, this procedure, the authority of which is of great value in the present difficulties, might have been omitted. The tribunal had, by virtue of the act of July 1, 1893, authorized the liquidator to contribute to the new company the assets of the Compagnie Universelle.

The consideration for this contribution consisted of 50,000 shares issued to the Colombian Government and 60 per cent of the profits of the new company. It is enough to say that it was subject to the working, to the fortunes of the company, to all acts which it might regularly and lawfully do, either by virtue of general law or by virtue of its articles of incorporation. If this company might lawfully and regularly transfer its concession, the liquidator must submit to this as to all proper acts possible by the articles of incorporation. But it may easily be understood that he was anxious to protect his responsibility, and that, in the presence of a possible controversy, he settled the question in the direction of an overscrupulous application of the act of 1893. Finally, it is to be noted that the agreement of arbitration had for its purpose to fix the method of settlement between those interested in the proceeds of the transfer of the assets of the new company, and that it was not unnecessary for a liquidator to obtain authority to make a compromise, an act which, in French law, is considered as particularly serious and subject to special authorization.

## XVIII.

In any case, whether the approval of the tribunal was necessary or was only advisable and constituted a measure of prudent precaution, it is beyond doubt that the liquidator consented and was authorized by the court to consent to the proposed transfer by the new company to the Government of the United States.

## XIX.

Finally, besides the liquidator of the *Compagnie Universelle* and the new company, there was a third party interested in maintaining the rights which it had under the concession of 1878—the Government of Colombia. Without referring to other documents exchanged between this Government and that of the United States of America, it is enough to say that on April 18, 1902, the envoy extraordinary of the Republic of Colombia to the United States agreed with the Secretary of State of the United States upon a treaty, article 1 of which contains an authorization by the Government of Colombia, given to the new company, to sell and transfer to the United States its rights, privileges, property, and concessions, as well as the Panama Railroad, and all shares and parts of shares of this company. We shall omit, therefore, from the present opinion, all objections based upon the prohibition of transfer to a foreign government contained in the law of 1878.

## XX.

A first fact appears from these occurrences, namely, the regular consent given by Colombia, the liquidator, and the new company to the plan of transfer to the United States.

## FIRST QUESTION.

“Has the New Panama Canal Company a certain and absolute title to the property it has offered for sale to the Government of the United States?”

The title of ownership—certain and absolute ownership—which is to be invoked for the benefit of the new company, comes from the contribution which was made to it by the liquidator of the *Compagnie Universelle*.

Article 5 of the articles of incorporation of October 20, 1894, is as follows:

“A party to these presents is M. Jean Pierre Gautron, judicial administrator of the civil tribunal of the Seine, residing at No. 13, Rue Tronchet, Paris.

“‘Acting as and in the capacity of sole liquidator of the *Compagnie Universelle du Canal Interocéanique de Panama*, by virtue of the powers conferred by judgment of the civil tribunal of the Seine, dated February 4, 1899.’

“M. Gautron, appointed to said office of liquidator by a judgment of the *Chambre du Conseil* of the civil tribunal of the Seine dated July 21, 1893, in said capacity contributes to the company:

“First. All rights accruing to the company in liquidation from the laws of the Government of the United States of Colombia, dated May 18, 1878, and December 26, 1890, as well as from any decrees, acts, or things whatever which have occurred in the execution of these laws with all the advantages provided by these laws, together with all lands and real estate granted to the company in liquidation or acquired by it.

“All subject to the fulfillment of the conditions of the laws and extensions of the concessions, and to the payment of all sums remaining due from the liquidator to the Colombian Government.

“Second. The works executed and under execution, workshops, buildings, hospitals, plant, erected and not erected, materials and supplies, etc., belonging to the *Compagnie Universelle du Canal Interocéanique* in liquidation, as well as all deposits as security made by said company in liquidation.

“Third. The plans, estimates, studies, documents of every nature collected by the *Compagnie Universelle du Canal Interocéanique*, relating in any manner to the study, execution, or exploitation of the canal or its dependencies, as well as the benefit of all agreements with all third persons.

“Fourth. The rights of every nature, part interests, and, generally, any others whatsoever, which may belong to the *Compagnie Universelle du Canal Interocéanique* in liquidation, in the railroad from Panama to Colon, operated by an American company, called the Panama Railroad Company, whose principal office is at New York, as said rights are enjoyed and exist; M. Gautron, as liquidator, binding himself to transfer the same to the present company in the form required by the laws of the United States of America in such manner, moreover, as the said rights and properties are enjoyed and exist and in the condition in which they are.

“The present company shall be the owner of the property and rights granted and contributed from the date of its formal organization, except as hereinafter provided, with regard to the Panama Railroad.

"This grant and contribution are made by M. Gautron, with the reservations and subject to the conditions hereinafter expressed, to wit:

"First. There shall be appropriated to the liquidator 60 per cent of the net profits of the enterprise, as these profits shall be determined under articles 51 and 52 hereof.

"Second. There shall be appropriated 50,000 shares, full paid, on account of those now issued to the Government of the United States of Colombia, in accordance with the extension law of December 26, 1890.

"Third. The rights of every nature in the Panama Railroad, belonging to the estate in liquidation and contributed by M. Gautron, under section 4 of this article, shall become the property of the present company from and after the stockholders' meeting provided for by article 75 hereof, without any pecuniary compensation, but upon the express condition that the canal be constructed within the time fixed by the agreement of concession. Upon default in completion within such time, said rights shall revert to the estate in liquidation.

"If, contrary to all expectation, the meeting in question should not take the necessary action for the completion of the canal, or if the course of action adopted by the meeting can not be carried out, the said rights in the railroad shall remain the property of the present company, but it shall pay into the estate in liquidation the sum of 20,000,000 francs by way of indemnity, and the share of profits set apart for the estate in liquidation shall be half the profits of the present company without other deductions than those provided in sections 2 and 3 of article 51 hereof.

"Accordingly, said rights shall remain inalienable in the hands of the new company until either the payment of the said sum of twenty millions, or the entire completion of the canal.

"Fourth. Until the entire completion of the canal, M. Gautron, in his official capacity, shall have the right to appoint a commission of control, composed of three members, taken, as far as possible, from among the engineers of the department of bridges and roads and the inspectors of finances, to inspect the progress of the works, the condition and maintenance of the plant and buildings, as well as the accounts relating to these different objects.

"The expense of this commission shall be borne by the new company."

# I.

It is indisputable that everything which forms the subject of the present plan of transfer to the United States is comprised in the contribution enumerated in article 5.

There is no dispute as to the validity of the title of the *Compagnie Universelle* to the property which was the subject of this contribution.

If the *Compagnie Universelle* was indeed the owner of the concession and of what we have called its increment, had it the right to transfer them? Did it transfer them regularly? Such are the first two questions to be examined.

II.

The Compagnie Universelle had the right to transfer the concession, because it was the owner of it, the right to alienate being one of the elements of ownership.

To make it otherwise it must be shown that the instrument by which it acquired them contained a restriction of this elementary right. Now, not only does this restriction not exist in the contract of 1878, but it *contemplates a transfer, and even successive transfers, and authorizes them.* Furthermore, the transfer made was known to the original grantor (the Government of Colombia); it ratified it both beforehand and afterwards. (See especially the agreement of extension of December 26, 1890, stipulating that the liquidator shall transfer all the assets to a new company—article 1 of the agreement of April 5, 1893, giving the liquidator time to form a new company—the agreement of May 7, 1900, in which the newly formed company is expressly mentioned and recognized.)

The right of transfer by the Compagnie Universelle belonging to it, from the very fact that it was owner, this right not having been restricted by the agreement of concession, but, on the contrary, expressly recognized both by the agreements of concession and by the subsequent agreements above mentioned, we are of the opinion that the right of the Compagnie Universelle to transfer to the new company the whole of its rights is absolutely certain.

III.

Did the Compagnie Universelle do regularly what it had the right to do? We say the company. It is it which made the contribution. Here we must avoid an ambiguity.

It is only in common language that we may say that a company disappears from the fact of its dissolution and liquidation. The truth in *legislation*, at least in France, is that it survives the liquidation. No doubt its purpose is profoundly changed; that is, in fact, no longer to undertake or continue the operations mentioned in the articles of incorporation, but to settle them, to realize upon its assets, to pay off its creditors, to divide the net cash assets among its shareholders. But for all these operations, the legal entity of the company, the collective entity designated by the corporate name, remains and has not disappeared. It is the company which realizes; it is the company which pays the creditors, reimburses its shareholders, answers any actions, carries on suits. It is this state of the law which in jurisprudence is expressed by this axiom: The company survives for liquidation.<sup>a</sup>

---

<sup>a</sup> V. Lyon Caen and Renault, *Traité de Droit Commercial*, t. II, No. 366:

“When a company is dissolved, there is, strictly speaking, between the former members, only a community of interest. They are owners in common. Hence it might be said that there is no longer an artificial person, no longer a corporate fund distinct from the private property of the members.

“But with such an idea there will be danger of impairing rights

So, the liquidator is not, with regard to the company, a third party, but a representative of the company. The law directs, the agreement usually provides, that, after dissolution, the company should be represented by a mandatory, *sui generis*, the liquidator. Though invested with a mandate different from and more restricted than that of the board of directors, for example, he is none the less a representative of the company; if he alienates, it is the company which sells; if he receives, it is the company which receives. Moreover, anyone may be chosen for this new mandate, a third party, a member of the company, a member of the board of directors, the board of directors itself, but, in this case, it will act, not with the general mandate resulting from the articles of incorporation, and with a view to the working of the company, but with the new and different mandate of representing the company for its liquidation. This maxim, that the company survives for all acts of liquidation, upon voluntary or judicial dissolution, is uncontested in French law.

It is, then, the company, represented by its liquidator, which made the contribution.

It made it validly for the following reasons:

First. The sale of the assets is fully within the powers of liquidation, because, usually, if the assets are not composed of cash, it would be impossible without a sale to make payment and division. Contribution to a company is in reality a sale; contribution of the assets to a new company is one of the most usual forms of liquidation; it is also fully within the powers of liquidation. (See especially Cass., May 12, 1896.)<sup>a</sup>

Second. The liquidator, in this case, received this power, as far as necessary, and in the most express way, from the decree of February 4, 1889—"appoints M. Joseph Brunet liquidator of the said company, with the broadest powers, especially to transfer or contribute to any new company, all or a part of the corporate assets."

Third. The act of July 1, 1893, adds to so many authorizations a new sanction; in regulating the exercise of the right of contribution, it makes it subject to formalities dictated by the interest of third parties, by the very fact that it regulates it, it sanctions it. We shall show, under the third question, that this act, like every French law, is sovereign, and exempt from the review of any judicial authority, even the highest.

---

acquired, to the great detriment of the credit of the company, or of hampering the working of the liquidation. \* \* \* In order to avoid these results, jurisprudence has agreed that, in spite of the dissolution, the dissolved company still exists as an artificial person for its liquidation, so far as it may be used to protect the rights acquired, and not to hinder the proceedings of liquidation."

<sup>a</sup> Adjudged by this decision that in case of changes which do not impair the purpose or the essential bases of a company, the judges decide absolutely that the liquidators had sufficient power to enter into an agreement for the purpose of contributing the corporate assets to a new company in exchange for full paid shares. (Comp. Trib. Civ. de la Seine, July 27, 1892. Rev. des Sociétés, 1892, p. 514.2.)

It produces this noteworthy result: That a procedure having been prescribed, making the validity of the contribution subject to formalities of procedure and publication, if these formalities were complied with—and we know that they were<sup>a</sup>—the contribution can no longer be contested nor attacked by any one.

It follows, hence, no less clearly: *First, that the transfer made to the new company by contribution was regular; second, that it can no longer be attacked.*

#### IV.

The Compagnie Universelle had the right to contribute its assets to another company.

This right is exercised in the person of its liquidator in the most regular way.

This question of regularity is absolutely settled.

Thence, we arrive inevitably at the conclusion that the title of the new company to the ownership of the property which composes the assets of the Compagnie Universelle is certain, and we add that any contest of its validity would be in France defeated, without examination of the merits, by the *plea of res judicata*.

#### SECOND QUESTION.

“Is this property in any measure legally encumbered by the debts and liabilities of the old company? In the event of the United States purchasing this property, would they by so doing become responsible for such debts and liabilities, and would they assume any kind of obligation toward the shareholders, bondholders, or other creditors of the old company?”

By reference to what was said above (Secs. IX and X) it will be seen that this second question is entirely governed by the first. The contribution, we have said, can be subject only to liabilities openly specified in the agreement of contribution, subject to the examination of the commissioners appointed by the first meeting, accepted upon their report, by the second, and without an estimate of which the value of the contribution can not be estimated. It all comes down, therefore, to considering whether the contributions were made subject to the payment of the debts and liabilities of the old company to any extent.

#### II.

The slightest examination of the articles of incorporation, and especially of article 5, excludes any idea of a general transfer of assets and liabilities. Such an arrangement was excluded beforehand by the most ordinary prudence, for it would have put the new company in the same situation as the old, to which the latter succumbed.

---

<sup>a</sup> See decree of June 29, 1894, publication in the *Officiel* of July 1, 1894. Decree of intervention of August 8, 1894.



A transfer of the indebtedness, then, does not appear in the agreement.

The deed being silent, it is excluded by *general law*.

A debtor may dispose of his property, but his creditors have no right to follow it, unless it is subject to an incumbrance upon the thing, hypothecation, pledge, mortgage, or lien. This is the distinction, fundamental in French law, taken from the Roman law, between a general creditor and a lienor *who has a right in the thing*. M. Troplong explains this in these terms:

"If the debtor alienates, the bond which united the property to the person is broken, and the thing having become part of the estate of another owner, the creditor will have no right to follow it there. Whence it follows that, if the general creditor has a legal claim upon the property of his debtor, this claim continues only so long as his debtor remains owner of the property. (Priv. et hyp., sec. 6.<sup>a</sup>)"

It must, then, be considered certain, in this whole affair, that a transferor remains alone subject to his general indebtedness, and that the transferee can only be bound to the creditors of the transferor by the obligations of a contract, and only to the extent of the debts which he has expressly promised to pay. French law reserves to the general creditor a single right, that of having the instrument of transfer itself annulled, in order to have the property sold restored to the estate of

---

<sup>a</sup> V. Paul Pont, Des privilèges et hypothèques, t. I, No. 12 et seq.

"Creditors have, as security, the general property of their debtor, personal and real property, present and future.

"This right of security embraces *all the property*. It embraces all property *present and future*.

"But there can not be taken into account property which the debtor may have had at the time of the obligation and which has ceased to be his when the performance of the obligation comes to be enforced, whether because he has sold it or even because he has given it away. The right of general security given by article 2092 continues, in fact, only so long as the debtor remains in possession; this is very evident, since any property which the debtor had in the past, but which he has no longer, can not be put in the category of property *present and future*, the only property which the right of security includes. If, then, the debtor has disposed of the thing belonging to him, if he has put it out of his estate by any act of alienation, he transferred it free and clear of this right of security by which it was affected in his hands; and it is in this respect, among others, that this right differs from a mortgage, which follows the real estate which is subject to it into whatever hands it passes. Creditors can, no doubt, have the thing restored to the estate of their debtor, if it was alienated in fraud of their rights (article 1167). But if the thing remains outside of the estate of their debtor, the security of the creditors will be so much less, though at the time when the obligation arose the thing was part of the estate of their debtor, from which it has since been separated."

the vendor. If it is not restored it forms part of the estate of the purchaser, absolutely protected from his pursuit. But to procure this annulment, contemplated by article 1167 of the Civil Code,<sup>a</sup> the creditor must prove two things: First. *That the sale was prejudicial to him.* Second. *That it was made to defeat the creditors and with fraudulent intent.*

Now—and here appears the second fundamental consideration which governs all this argument—a deed consented to by the creditor, or declared regular in litigation with him, can not be subject of the action mentioned in article 1167, consequently neither the transfer by the liquidation to the new company nor the transfer by the new company to the United States can any longer be attacked; first, because the transfer from the Compagnie Universelle to the new company was approved by the creditors of the Compagnie Universelle, authorized by the court, ratified by the act of 1893, declared good and valid by the decrees of June 29 and August 8, 1894; second, because the transfer to the United States was approved by the liquidator of the Compagnie Universelle, authorized to enter into the agreement of December 24, 1901, because this agreement was itself approved by the decrees of March 19 and July 3, 1902, and by the decision of August 5, 1902; third, because the Panama bondholders and all the creditors of the old company were represented in the proceeding which ended in the decree of August 5, and there is, as against them, an admission that the agreement is advantageous, a judicial decision holding that it is lawful.

So that it may be said that from these two facts, the rights of general creditors do not survive a transfer, no action by them founded upon article 1167 can be hereafter brought, it would follow sufficiently and evidently that the transfer to the United States would involve *for the purchaser no other liabilities than those expressed in the deed*; that henceforth *no action can be brought* by former creditors for the purpose of invalidating this transfer.

## XII.

Without dwelling longer upon these conclusions, we draw, from what has been said, the necessary consequence that the new company can only be bound by the obligations which it accepted and which are expressed in writing in the agreement of contribution and in the articles of incorporation.

These obligations are the following:

First. To conform to the clauses and conditions of the concession (see last paragraph of article 1), and consequently, the concession being contributed by the Compagnie Universelle to the new company, it binds itself to the former “to fulfill all the conditions of the laws and extensions of the concession and to pay all sums remaining due from the liquidation to the Colombian Government.” (Art. 5, par. 6.)

---

<sup>a</sup>Art. 1167, Civil Code.

Creditors may also in their personal name attack acts done by their debtor in fraud of their rights.

Second. To pay to the *Compagnie Universelle* in liquidation 60 per cent of the net proceeds of the enterprise.

Third. To allot to the Government of the United States of Colombia 50,000 shares entirely full paid, out of those created, in conformity with the law of extension of December 26, 1890:<sup>a</sup>

Nothing can be clearer, more precise, and more exactly limited.

Finally, concerning the Panama Railroad shares, we have said (see Sec. XII) upon what conditions subsequent they were transferred to the new company.

Such are the only obligations accepted by the new company as the equivalent of the transfer. They are the price of the transfer. They have nothing to do with the indebtedness of the *Compagnie Universelle*. Creditors of the latter do not become creditors of the former.

Still further, the fact of estimating the price of the transfer excludes any hypothesis of a general transfer of assets and liabilities, for a fixed price is not given for assets transferred, if the purchaser must bear the unascertained burden of unknown liabilities.

In short, the regular transfer of the concession does not entail for the new company any obligation to pay to any extent whatever the liabilities of the *Compagnie Universelle*, but only an obligation to bear the charges above mentioned, which are enumerated to the exclusion of all others.

We repeat again, as an indisputable thing, that any other obligation, not written, not expressed—and it has never been alleged by the *Compagnie Universelle*, nor by anyone, that there was a secret stipulation—would be null, even if it were not unlawful with regard to the contracting parties. In corporate matters there can be neither secret compact, nor trust, nor defeasance.

#### XIV.

Answering the second section of the second question, it is by this very fact demonstrated that in accepting a transfer from the new company of the rights inherent in the concession of which it has become the owner the United States do not expose themselves to answering for any debt whatever of the *Compagnie Universelle* to third parties. For this there are two conclusive reasons: First. What has been said of the effects of the transfer by the *Compagnie Universelle* to the new company would be true of a transfer by the new company to the United States. The latter will owe the new company only the price stipulated, and in regard to its creditors they will contract no other obligation than that of paying their debtor the price agreed upon. If, as is plain, the pur-

---

<sup>a</sup> First. There shall be appropriated to the liquidation a share of 60 per cent in the profits of the enterprise, as these profits shall be determined under articles 51 and 52 hereof.

Second. There shall be appropriated 50,000 shares, full paid out of those now created for the Government of the United States of Colombia, in conformity with the extension law of December 26, 1890.

chaser becomes a debtor only for the purchase price, he does not become the debtor of all the creditors of the transferor. This is not the case with general successors, such as natural or testamentary heirs of the purchaser.

If the purchaser—the United States in this case—does not become the debtor of the creditors of the new company, still less would he become the debtor of the creditors of the old company. To raise the question, they must first have become creditors of the new company. Now we have shown that they are nothing of the sort; but, were the terms of the contribution of 1894 different, it would be enough to destroy their claim to consider that the act of transfer to the United States, in the form proposed, will not confer upon the creditors of the new company any right either to follow its property into the hands of the purchaser or against the purchaser personally.

#### XV.

What we have said with regard to the creditors, either of the new company or the old, is absolutely true in regard to their shareholders. The same deeds can be set up against them. The transfers made have, with regard to them, the same bearing, the same regularity. No more than the bondholders can they impose upon the transferee an obligation which has not been stipulated. Against them may be set up an additional plea, drawn from the fact that to these deeds they are not third parties; they are parties to the deeds. It is enough to say that if these deeds may be successfully set up against third parties, it is not reasonable that they should be attacked by those who signed them.

#### XVI.

The objection has been made, it appears, that the *Compagnie Universelle* had not completely divested itself of the property transferred. As a proof is cited the fact that it stipulated for a share of 60 per cent in the profits. From this it is argued that, this share being taken away from it by the transfer to the United States, it may recover all or a part of its former assets.

We oppose to this erroneous argument two decisive answers:

First. The *Compagnie Universelle* might have required as the price of the transfer a sum of money fixed, immutable, and which could neither be increased nor diminished. It did not do so for the simple reason that it never could have got a fixed price which was at the same time a high price for a concession, the carrying out of which remained subject to so many hazards that the parties considered that the possibility of carrying it out could be determined only later. (See article 75 of the articles of incorporation.) It preferred to stipulate for an indeterminate price, consisting of 60 per cent of the profits to be made by a company. By a company, that is to say, by an artificial person, subject to the causes for involuntary legal dissolutions and which reserved to itself expressly (see article 60) the right, if it thought advisable, to dissolve itself voluntarily.

Whence it follows that it is as if the provision had been that it gave up its assets in consideration of 60 per cent of the profits *so long as the company should not be under the legal necessity of dissolution or should not think it necessary to dissolve*. And let it not be said that this second hypothesis allowed the new company to defeat the liquidation by dissolving itself arbitrarily. In fact, without mentioning the guaranties furnished by the conditions which, in that case, must be complied with, on the one hand, dissolution gave to the Compagnie Universelle the right to appear upon the liquidation of the new company and to receive a part of its assets corresponding to the value of its ultimate 60 per cent; on the other hand, if the dissolution were intended to defeat it or fraudulent, the liquidator of the Compagnie Universelle could have it annulled. And here we reach the second answer.

Second. Not only did the liquidation not consider the alienation of the concession harmful to it, but it desired it, preferring a certain and speedy price to remote and uncertain profits. It prepared the way for it. It had itself authorized to discuss the terms and fix the benefit which would come to it therefrom. This consent was sanctioned both by the decree of March 19, 1902, by the decree upon intervention of July 3, and by the decision of August 5. Let us add that the representative of the bondholders has stated that he himself did not intervene, because his clients approved the transfer.<sup>a</sup>

So, if the liquidation had—and it certainly had not—the right, in case of transfer by the new company, to maintain that, by the effect of the failure to carry out the clause relative to the 60 per cent, it should be restored to the property which it had alienated, it expressly decided not

---

<sup>a</sup> Maître Charneau, attorney, gave notice in the name of the sieur Lemarquis in his official capacity, for whom he appeared, to Maître Caillet and de Biéville, of requests to find upon intervention by which alleging:

That the sieur Lemarquis in his capacity of representative of the holders of Panama bonds had the right of intervention in the proceeding pending between the sieur Gautron in his official capacity and the sieur Donadieu.

That the transfer proposed, to the Government of the United States of America, to which the sieur Gautron has consented, is favorable to the interests of the bondholders.

He asked that it might please the tribunal.

To recognize Maître Charneau in his appearance for the sieur Lemarquis in his official capacity.

To recognize the intervention of the sieur Lemarquis, that he joined in the requests for judgment of the liquidator, and that he approved wholly the understanding reached between the liquidator and the New Panama Company for the purpose of a transfer of the enterprise to the Government of the United States of North America for the sum of \$40,000,000.

And to decree according to law as to the costs.

to do so, and its acquiescence in the alienation sanctioned by the court has become irrevocable by the effect of judicial decisions which have become *res judicata*. We may, therefore, think it strange that to disturb the resolutions to be passed there is argued the possible exercise by the liquidation of a right which it did not have, and which, in any case, it has renounced by having it adjudged that it was for its interest that the transfer should be carried out. The same argument might be used against the bondholders or creditors of the *Campagne Universelle*.

## XVII.

We give no more force to the arguments drawn from the consideration that, the liquidation having stipulated for the right to appoint a commission for the purpose of inspecting the progress of the works, it may be inferred that it had not divested itself of the ownership of the concession and of its increment.

There is no correlation between these two ideas.

Nothing prevents a contributor who has received shares in payment—whence it follows that he will be paid or not according as the enterprise shall be well or ill managed—from requiring guaranties of good management. If he obtains them he is none the less a shareholder, and if he is a shareholder he is no longer the owner of property contributed, but of what represents it in capital stock.

It will never be possible, at least under our legislation, to reconcile these two facts—a contribution in consideration of a price, of whatever nature it may be; retention of ownership of the contribution by him who has made the transfer and has received the equivalent for it. But there is more. It is precisely because the liquidation transferred the ownership of the concession and of the works begun, and divested itself of it, that it was important for it to stipulate for a guaranty of good management in the future; for if it had retained the ownership, so that the new company was only a sort of mandatory, interested in the proper completion of the enterprise, this stipulation would then have been wholly needless.

## THIRD QUESTION.

“Is the law of July 1, 1893, unimpeachable and absolute according to the constitution and according to French law? Have the French judicial authorities power to discuss the validity of said law?”

The act of July 1, 1893, is, according to the French constitution, not open to attack and of absolute authority. The French constitution in this point differs wholly from that of the United States, which has conferred upon the supreme judicial authority a right of review over legislative acts. More than one writer, more than one politician in France, has emphasized the dangers of the sovereignty of the legislative power and has praised the precautions accepted in the United States against the possible excesses or errors of legislators. We have not here to take sides in this controversy, but to state what is the fact. We declare that there is no superior power which can either modify or annul a law

passed by the two chambers. Still further, the highest of our judicial jurisdictions, the court of cassation, or supreme court, is in its essence created to insure execution by the inferior tribunals of all laws as they are promulgated. Far from its being able to modify them or suspend their execution, its duty is to reverse any decision which has either misinterpreted or wrongly applied a law, though it appear detestable to the high court. It is enough to say that the act of 1893 can not now be the subject of revision or criticism on the part either of the executive power or of the judicial power.

A law passed in France by the Parliament (the two chambers) can only be repealed or modified by another law passed by Parliament. But were this done, the new law is applicable only for the future, and all acts done before it goes into force remain subject to the former legislation. Whence it follows that were the act of July 1, 1893, abrogated or amended, all acts done previous to this event will be valid or not, according as they are or are not in conformity with its provisions.

#### FOURTH QUESTION.

“Is the New Panama Canal Company in any measure a government corporation in France, and is the cooperation of the French Government necessary for the transfer which the New Panama Canal Company proposes making to the Government of the United States?”

In the period prior to 1867 the formation of certain commercial companies was subject to the authorization of the Government (a certain number of joint-stock companies organized before that date remain subject to the old legislation). In 1867 the general law applicable to commercial companies was radically changed, and thenceforth, by observing the procedure and the rules for publicity prescribed by the act of July 24, *companies are made freely, like any other contract.*

Even before 1867 an authorized company was in no way a governmental company; having obtained authorization, it remained *private*, and preserved this private character for everything concerning disposal of its property, liquidation, realization upon, or sale of its assets.

*A fortiori*, a company like the new company, organized under the act of July 24, 1867, is absolutely independent of the Government. The latter did not have to intervene for its formation, and does not have to intervene in its management or its liquidation. This the Government has declared several times, on March 22, 1882, in diplomatic correspondence, and later in 1893 on the floor of the Chamber of Deputies.

That the Government and Parliament intervened to authorize the issue of lottery bonds is explained in the simplest way by a circumstance which has nothing to do with the nature of the company. The issue of lottery bonds is considered in our legislation as a lottery; no lottery can be established by private persons, any more than by a company, without the authorization of the minister of the interior, if it does not exceed a certain figure, without a law, if it exceeds this figure; therefore a bill was necessary to authorize the issue of Panama lottery bonds, and the

company no more lost its private character than a private person who should have asked and obtained authority to establish any other lottery.

The new company, then, is certainly not a governmental company, and the French Government has not to intervene and can not intervene in the transfer which it makes to the United States.

#### FIFTH QUESTION.

"Will the proposed transfer, duly carried out by deed of the New Panama Canal Company and by deed of the liquidators of said company, the dissolution of which would be declared, place in the hands of the United States an absolute and unconditional title to the transferred property, without the United States assuming thereby any of the obligations of the old company to the shareholders, bondholders, and other creditors of said company?"

"Of course the New Panama Canal Company, having made the transfer, will, without delay, fulfill all its obligations toward the liquidator of the old company as they appear by the decision of the arbitrators (dated February 11, 1902, made in execution of the contract dated December 24, 1901.)"

Thus stated, the question is, perhaps, not presented with sufficient clearness. It appears from the verbal explanations which have been given us that it would be more exactly formulated in these terms:

Has the new company power to transfer the concessions, and its assets connected therewith, to a third party, for example, the United States? In what form and by whom should this transfer be carried out, to place in the hands of the purchaser a title of absolute and unconditional ownership to the property transferred, without the United States assuming any of the obligations of the old company to the bondholders, shareholders, or creditors of the said company?

#### I.

We have said that a transfer by a company, as by a simple private person, entails no obligation for the transferee to pay the debts of the transferor; the obligations of the transferee are limited by the agreement itself. The only obligations, besides those stipulated, which follow the subject of the transfer into the hands of the new owner are the obligations annexed to the thing—those which constitute debts of the thing sold and not of the vender. But this supposes, of course, that the sale is made by a person capable of making it, or authorized to make it, if that is necessary—in a word, a valid sale. The whole question, then, lies in considering whether the new company has power to alienate its concession and the property appurtenant to it.

#### II.

It may be said that if the company has the right to sell a part of its assets, it can not alienate the very object of the company without the company's disappearing, that by so doing it goes contrary to its pur-



pose, which is to accomplish the enterprise in view of which it was formed, and that its duty is to procure for the parties in interest its accomplishment.

This idea, correct as a general statement, could not be made an invariable and absolute rule of law without the most serious inconveniences. By it a company would be bound to pursue the accomplishment of its purpose until the complete exhaustion of its resources, and to consume then progressively, even though it was certain, either that the purpose can not be accomplished by it or that it, as well as all parties interested, should find it clearly to their advantage to transfer its enterprise instead of pursuing it.

This pernicious rule does not exist in our legislation concerning companies. On the contrary, article 37 of the act of 1867 requires that in case three-fourths of the capital is lost the shareholders' meeting should be consulted as to the propriety of continuing the enterprise or abandoning it, and it is enough in this case that one-fourth of the capital be represented.

If the legislator requires the company to decide under the circumstances above mentioned he allows it, even without these circumstances, to decide to stop the enterprise under the single condition that the meeting of stockholders should comprise half the shares of the capital. This is a settled point in doctrine and in law, even though the articles of incorporation are silent. (See opinion of Mes. Limbourg, Devin, Du Buit, Henri Thiéblin et Gontard, p. 49.)

If they have expressly reserved to the shareholders' meeting the right, in any state of the case, of passing upon the propriety of continuing or discontinuing the corporate business, no doubt can remain.

### III.

This is precisely the situation of the new company, whose articles (article 60)<sup>a</sup> gave the shareholders' meetings regularly constituted—that is to say, in conformity with the provisions of articles 61 and 62—the right to shorten the duration of the company, to extend it, or immediately to dissolve the company.

Now, this is a provision left by the act of 1867 to the general rule of freedom of agreement, and no one in France will contest its lawfulness. Let us add that it was made necessary for the new company by the cir-

"If experience shows the desirability of making modifications in or additions to the present statutes, the stockholders' meeting shall provide for the same in the manner fixed in articles 61 and 62 hereof.

It may especially determine upon—

A reduction of the capital of the company;

A reduction in the duration, the prolongation, or the earlier dissolution of the company;

Its consolidation with other companies;

It may even introduce modifications in the objects of the company, without, however, changing their essential character.

cumstances under which it was formed; a company to attempt, created to protect the concession, to prevent its lapse, uncertain (the articles show) whether it could itself complete the enterprise, uncertain (the articles again show) whether the enterprise could be carried out, at least as it had been planned.

#### IV.

We say, consequently, that the new company may certainly put an end to its operations and transfer the concession. It remains to examine the second part of the question: In what form and by whom should the transfer be made to place in the hands of the purchaser a title of ownership not open to attack.

Several solutions may be adopted with perfect safety.

The new company may, by virtue of article 60, a meeting of shareholders having been called in conformity with articles 61 and 62, put itself in liquidation.

Supposing that it limited itself to appointing a liquidator *with ordinary powers of liquidation*, no more will be needed to enable him to transfer the corporate assets, in whole or in part, to a third party with the most absolute regularity.

We refer here to Section III of the first question, and we repeat, to sum up, that the receiver has full power to carry out a sale of the assets; that he then binds the company itself; that it is it which alienates, by its mandatory; that it survives, as an artificial person, until final distribution, and that to deal with the liquidator for the purchase of the assets is to deal with the company itself.

But the articles allow the company to do something still more certain and less open to attack, if possible. The shareholders' meeting may (article 63) fix the manner of liquidation and decide, for example, either that it shall take place by contribution of the assets to a new company or by sale in parcels or by transfer as a whole. The liquidator, conforming to this specific mandate, will bind the company to third parties in the same way as if they had dealt with the company itself.

#### V.

A second solution is furnished by the following consideration:

To show that a company can not alienate its corporate capital, it is observed that this act of alienation puts an end to its operation, which is strictly correct. But this demonstrates only that the company which alienates its assets by the same act brings about its dissolution, and, as it has been demonstrated that the company has full power to dissolve itself, it remains proved that it has the same right to do any act involving its dissolution.

The new company may, then, by a decision of a meeting of shareholders, approve the proposed transfer, give its board power to carry it out and decide at the same time that, by the fact of carrying it out, the company shall be altogether dissolved. Then dissolution will be

the consequence of the transfer itself. This is the solution suggested by my eminent colleagues of Paris. It is, in my opinion, absolutely legal. A meeting of shareholders which may vote dissolution may vote an act involving dissolution. It will be necessary, however, for this decision, to comply with the same conditions as if it operated immediate dissolution; that is to say, that a meeting of shareholders should be made up in conformity with articles 61 and 62 of the articles, and that the decision should be published in the form prescribed in the act of July 24, 1867.

## VI.

There is a third solution, no less legal. Against the preceding, an objection might be raised which is, no doubt, only specious, but which it would be preferable to avoid. It may be said that a meeting of shareholders which votes for an act involving dissolution and which thus, and by that very fact, votes for dissolution, can not at its will postpone consequences of that decision; that by the effect of this vote dissolution takes place immediately, and that from that moment the powers of the board of directors, as defined in the articles of incorporation, limited to the management of affairs while the company is in operation, disappear, and they are without power to perform an act of genuine liquidation. We do not think the objection well founded, and we do not see how it could be demonstrated that, the shareholders' meeting having power to vote dissolution or not, at its option, it would not have the right to vote its subject to a condition or at a fixed time, and we think that it would only be incapable of doing so if a case arose of *legal* and hence *obligatory* dissolution.

But in such a matter the best arrangement will be that which offers the most security to the purchaser and the least opening for controversy.

If results, both from the corporation law and the articles of incorporation, that the new company is *in full control of its liquidation*, and that it can consequently, by law and by its articles, in the plenitude of its power, decide that its liquidation shall take place in a given form and by a given determinate act. It may, in a word, *carry out its liquidation at the same time that it decides upon it.*

A meeting of shareholders should be called in conformity with articles 61 and 62 to adopt the following resolutions:

First resolution: The special shareholders' meeting approves the plan of transfer to the United States as the President of the United States is himself authorized to accept it.

By this first resolution it is the company itself which binds itself in the plenitude of its power and in a form which binds all shareholders and which may be set up against all parties in interest.

Second resolution: It decides that, to conclude this transfer, the company should be declared to be in liquidation and consequently appoints M. X., with express authority, for it and in its name, to fulfill all formalities and sign all papers necessary to carry out the transfer.

By this second resolution the meeting creates the legal representative contemplated by the law in case of liquidation, and no contest can be made hereafter as to the authority of its mandatory.

Third resolution: In case modifications in the plan of transfer should be proposed, the liquidator shall submit them to a meeting of shareholders organized in conformity with articles 33 and 34.

It is prudent to provide for this possibility.

This third resolution is justified by the right, conferred upon the meeting of shareholders by article 63, to regulate the procedure of liquidation, the powers of the liquidator and the terms of their exercise.

By this method in dealing with the United States the liquidator does not merely perform an act within his general powers, but carries out a decision made by the company itself and which can be set up against it, not only as an act which the liquidator had the right to do, but as an act emanating from itself.

He does not merely make a decision which he would have the right to make by virtue of his powers, but fulfills a precise and formal mandate, which consists in carrying out an agreement accepted by the company itself.

A contract made under these conditions by the new company with a company, or with any person whatever, would not be open to attack in France.

## VII.

It may become still less so by making parties to the deed, parties not necessary but supererogatory, the only persons who have a right, not real but apparent, to object to the alienation made by the company. We have proved that it has become the owner of the assets which are the subject of the transfer; that as owner it can dispose of them; that by following one of the three forms above mentioned it will dispose of them validly.

It lawfully binds its shareholders, who are bound by a decision of the shareholders' meeting; as to its creditors, it has no other obligation than to divide the price among them; as concerns the *Compagnie Universelle*, it has the right to dispose of its assets upon condition only of giving over to it the full share of the price to which it may be entitled; its right to transfer was recognized by the agreement of December 24, 1901; the decision of the arbitrators of February 11, 1902, settled the amount of its claim. The whole has been confirmed by decrees and decisions.

Concerning the creditors of the old company it has no obligation and no legal connection; the transfer which the latter made to the new company was approved and has become final by compliance with the formalities of the act of July 1, 1893. Further still, in the procedure leading to the decree upon intervention confirmed by the decision of August 5, 1902, the representative of the bondholders, who alone had power to oppose the sale, declared that he approved the agreement reached with a view to the transfer. Whence it follows that the presence of and sig-

nature of the final act of transfer to the United States by either the liquidator of the Compagnie Universelle or the representative of the bondholders is in no way necessary.

Nevertheless, and if it be desired to push the spirit of precaution beyond the limits of ordinary and sufficient prudence, it seems easy to make the liquidator of the Compagnie Universelle a party to the contract.

The agreement of December 24, 1901, provides (article 1st), "the new company remains charged with carrying on the negotiations. *It shall have full powers to conclude eventually with the United States, and to fix, after discussion with it, the price and conditions of the sale.*"

This agreement, the plan of transfer made in consequence by the new company for the price of \$40,000,000, were confirmed by decrees of March 19 and July 3, 1902. The liquidator certainly finds in these decisions the power necessary to sign the final deed of transfer, and if he thought that he should solicit a new confirmation from the court, we may be assured that the tribunal would not reverse itself.

In the same way, the decree of August 5, 1902, being made in a proceeding to which the representative of the bondholders was a party, he has also full power to ratify a transfer which he could not oppose by reason of the decision made.

But the presence, at the making of the deed between the United States of Colombia and the new company, of the liquidator and of the representative of the bondholders, would have no other merit than to sanction a state of things which is settled, *since, to repeat it for the last time, the plan of transfer is henceforth, by the effect of judicial decisions which have become res judicata, not open to attack either by the liquidator or by the representative of the bondholders.*

#### VIII.

To sum up, the undersigned counsel expresses his formal opinion that by the transfer which the new company might make to the United States in one of the three forms set forth in Sections IV, V, and VI of the fifth question the United States will acquire the firmest and most impregnable title of ownership to the property transferred and will assume no other obligations than those stipulated for in the contract of transfer itself, without any other claim being possible to be made, either by the old company, or by its shareholders, or by its liquidator, or by its creditors and bondholders, or by their representative.

Paris, September 21, 1902.

WALDECK-ROUSSEAU,  
*Advocate of the Court of Appeal.*

RIGHT OF MASTER OF FOREIGN VESSEL TO SHACKLE  
ALIEN IN PORT OF THE UNITED STATES.

The master of a foreign vessel has a right, under the laws of the United States, to put in irons an alien on board his ship who is not allowed by law to enter the United States, in order to prevent such person from unlawfully landing; but this may be done only in exceptional cases and where nothing less will prevent the landing of such person.

By the comity of nations, masters are permitted to exercise the same power, practically, in port as at sea, so far as matters within their vessels and not disturbing the peace of the port, are concerned.

Whether such officer should put irons upon an alien immigrant is a question of *care* and good faith. He must, in good faith, be careful to prevent the landing; but when he has exercised reasonable care to that end, he neither must nor may do more.

What is care or negligence is a question which varies with the particular cases; it does not depend upon the master's discretion, but may be brought by the alien to the determination of the courts.

DEPARTMENT OF JUSTICE,

*November 19, 1902.*

SIR: I have received your letter of the 4th ultimo, stating that in a recent case happening at San Francisco, a question has arisen whether "a master of a British vessel has a right, under the law of the United States, to put in irons an alien on board his ship who was not allowed by law to enter the United States, in order to prevent that alien from landing."

It seems that the representative of Great Britain at this capital desires to be informed as to "the rights of ship-masters in the premises."

The facts of the case are not before me and the question of the legality of acts of that kind is one for the courts, but, in view of the source of the inquiry, I take pleasure in furnishing the following views:

The act of Congress of March 3, 1891 (26 Stat., 1085), provides:

"That it shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall knowingly or negligently land or permit to land any alien immigrant at any place or time other than that

designated by the inspection officers, shall be deemed guilty of a misdemeanor and punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment."

The general power of a shipmaster at sea includes that of confining a passenger in irons. This he can justify doing in an extremely aggravated case, and in such matters he acts at his peril, the courts affording, according to the circumstances of each particular case, protection or vindication to the passenger improperly so treated.

By the comity of nations, masters are permitted to exercise the same power, practically, in port as at sea, so far as matters within their vessels and not disturbing the peace of the port are concerned.

If the purpose of your inquiry is to ascertain whether in any other than very rare and exceptional cases a master can put in irons an alien, not allowed to land, I answer that he can not do so. But instances are conceivable in which nothing less would prevent the landing of a person or persons defiantly bent on landing, and where the master, for special reasons, would be inadequately provided with the ordinary means of prevention.

That, in such a case, he could lawfully prevent the landing by the extreme course seems to follow from his right to prevent the person's landing, and the general proposition that ironing is not in itself an unlawful means of constraint by shipmasters.

Whether he should put irons upon an alien immigrant is a question of *care* and good faith. Congress desires to accomplish a certain obvious result, and the master should act in good faith accordingly. If his owner had a desire to prevent a person's landing from the vessel, to accomplish an analogous result, and it would in certain circumstances be negligence in him to omit to shackle the person, Congress seems to require him to shackle the passenger in like circumstances, by requiring "due precautions" and imposing a penalty for "knowingly or *negligently* landing or permitting to land" an objectionable alien immigrant.

He must, in good faith, be careful to prevent the landing. When, as a matter of fact, he has exercised reasonable care

to that end, he neither must nor may do more. And what is care, or, to use the opposite phrase, "negligence," is a question which varies with the particular cases, and one which does not depend upon his discretion but can be brought by the alien to the determination of the courts.

Respectfully,

P. C. KNOX.

The SECRETARY OF STATE.

---

DUTY ON SHAFT LANDED IN UNITED STATES FOR USE ON  
FOREIGN VESSEL.

A steel shaft can not be landed and kept on the dock of the Cunard Steamship Company in the United States, for possible use on the steamships *Etruria* and *Umbria* in case of emergency, without payment of duty thereon.

The opinion of the Attorney-General of February 24, 1899 (22 Opin., 360), distinguished.

DEPARTMENT OF JUSTICE,

*November 20, 1902.*

SIR: I am in receipt of your letter of the 7th instant, requesting an expression of opinion as to whether a steel shaft may be landed and kept on the dock for possible use on the steamship *Etruria* or *Umbria* of the Cunard Steamship Company, Ltd., without payment of duty.

I am of opinion that this can not be done, and that if the shaft be landed, whatever its intended use may be, the duty must be paid.

The case is within the rulings cited by you, save that of my predecessor approving the view of the Solicitor-General of February 24, 1899 (22 Opin., 360); and the view there expressed was in large measure due to a particular state of facts which does not prevail in the present case.

The material differences, as you in part note, between that case and the one under consideration are that there the article was made in duplicate at the time and as part of the original equipment, was intended for immediate use in "relieving a disabled ship of a friendly nation detained in



534 *Postal Service-Philippine Islands-Penalty Envelopes.*

one of our ports for repair," was not actually landed, but was transferred from one vessel to another in the harbor. Here the shaft is one of a number kept on hand at the home port as part of the original equipment, is needed for no emergency, but is intended to be landed and kept on the dock for possible use in case such emergency should arise. But whether these differences be vital or not, the somewhat liberal construction in the opinion referred to is not to be extended beyond the facts of the particular case then under consideration.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

---

POSTAL SERVICE IN THE PHILIPPINE ISLANDS—PENALTY  
ENVELOPES—WAR DEPARTMENT.

The domestic postal service of the Philippine Islands is under the exclusive control of the Philippine government.

Official mail coming from those islands through the postal service of the United States should, however, comply with the general laws of the United States regulating the mails under the administration of the Postmaster-General.

Under the instructions of the President to the Philippine Commission of April 7, 1900, and the Executive Order of June 21, 1901, the powers and duties thereby conferred upon the commission and the civil governor were to be exercised under the direction and control of the Secretary of War, and the act of July 1, 1902 (32 Stat. 691), in ratifying and approving the instructions and order referred to, continued this relation. The reasonable inference is, therefore, that until otherwise provided, Congress intended that the government for the Philippine Islands should be regarded as a branch of the War Department.

The penalty envelopes used for the transmission of official mail from those islands should, accordingly, bear the indorsement of the War Department.

DEPARTMENT OF JUSTICE,

*December 2, 1902.*

SIR: In your letter of October 29, and inclosures, my attention is called to act No. 179 of the Philippine Commission, passed July 24, 1901 (Pub. Laws and Resolutions, Philip-

pine Commission, vol. 1, p. 564), authorizing the free transmission of official mail matter in that archipelago under regulations which, in your opinion, are in a manner in conflict with the existing laws of the United States respecting the use of penalty envelopes. This, you say, brings before you the question of the right of the Commission to enact laws of that character, and you ask to be advised as to the relation which the Philippine postal service sustains to your administration—whether it be separate and distinct therefrom and not governed by the same laws, and also as to the indorsement that official mail matter coming from those islands should bear.

The question as to the relation which the Philippine postal service sustains to your Department must, of course, be determined in the light of the orders of the President and the legislation of Congress in regard to the administration of affairs in that archipelago.

By the act of July 1, 1902 (32 Stat., 691), entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," Congress, in section 1, approved, ratified, and confirmed the action of the President "in creating the Philippine Commission and authorizing said Commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred, and in creating the offices of civil governor and vice-governor of the Philippine Islands, and authorizing said civil governor and vice-governor to exercise the powers of government to the extent and in the manner and form set forth in the Executive order dated June twenty-first, nineteen hundred and one, and in establishing four executive departments of government in said islands, as set forth in the act of the Philippine Commission entitled 'An act providing an organization for the departments of the interior, of commerce and police, of finance and justice, and of public instruction,'" and directed that "until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided."

The instructions to the Commission of April 7, 1900, above referred to, were embodied in a letter to the Secretary of War, in which the President expressed his desire to bring about the establishment of civil government in the Philippines and notified the Secretary of the appointment of a Commission to continue and perfect the work already begun by the military authorities. "It is probable," he said, "that the transfer of authority from military commanders to civil officers will be gradual and will occupy a considerable period. Its successful accomplishment and the maintenance of peace and order in the meantime will require the most perfect cooperation between the civil and military authorities in the islands, and both should be directed during the transition period by the same executive department. The Commission will therefore report to the Secretary of War, and all their actions will be subject to your approval and control."

The Secretary was directed to instruct the Commission to proceed to Manila and familiarize themselves with the conditions and needs of the country, and to devote their efforts first to the establishment of municipal governments, and next to the organization of government in its larger administrative divisions, corresponding to counties, departments or provinces, and embracing those municipalities whose interests might be best subserved by a common administration. Whenever the Commission was of opinion that the condition of affairs in the islands was such that the central administration might safely be transferred from military to civil control, they were to report that conclusion to the Secretary, with their recommendation as to the form of central government to be established for that purpose.

The instructions in question further provided that, beginning with the 1st day of September, 1900, the authority to exercise, subject to the approval of the President, through the Secretary of War, that part of the power of government in the islands which was of a legislative nature, should be transferred from the military governor to the Commission, and be so exercised by them until the establishment of the contemplated civil central government, or until Congress should otherwise provide. This legislative authority was to

include "the making of rules and orders, having the effect of law, for the raising of revenue by taxes, customs, duties, and imposts; the appropriation and expenditure of public funds of the islands; the establishment of an educational system throughout the islands; the organization and establishment of courts; the organization and establishment of municipal and departmental governments, and all other matters of a civil nature for which the military governor is now competent to provide by rules or orders of a legislative character."

By the Executive order of June 21, 1901, also referred to in the first section of the act of July 1, 1902, the President of the Commission was appointed civil governor of the Philippine Islands, and directed to exercise the executive authority in all civil affairs of government theretofore exercised by the military governor, under and in conformity with the instructions to the Commission of April 7, 1900, and "subject to the approval and control of the Secretary of War." The military governor, however, was to continue the exercise of his authority in those districts in which the insurrection against the authority of the United States continued to exist, or in which public order was not sufficiently restored to enable provincial governments to be established.

This order of the President was authorized by a resolution of Congress, commonly known as the "Spooner resolution," which was attached to and made a part of the army appropriation act of March 2, 1901 (31 Stat., 895, 910). That resolution provided that "all military, civil, and judicial powers necessary to govern the Philippine Islands \* \* \* shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion." The resolution further provided that "until a permanent government shall have been established in said archipelago full reports shall be made to Congress on or

before the first day of each regular session of all legislative acts and proceedings of the temporary government instituted under the provisions hereof; and full reports of the acts and doings of said government, and as to the condition of the archipelago and of its people, shall be made to the President, including all information which may be useful to the Congress in providing for a more permanent government."

By the act of July 1, 1902 (sec. 1), future appointments of civil governor, vice-governor, members of the Philippine Commission, and heads of the executive departments of the Philippine government are to be made by the President, by and with the advice and consent of the Senate. But the appointment of all other civil officers is left, as prescribed in the Executive order of June 21, 1901, with the civil governor, acting with the advice and consent of the Commission.

The act of July 1, 1902, also provides that all laws passed by the government of the Philippine Islands shall be reported to Congress, which reserves the power and authority to annul the same.

It thus appears that by the Spooner resolution Congress authorized, and by the act of July 1, 1902, it ratified and confirmed, subject to the limitations prescribed therein, the establishment of a form of government for the Philippine Islands distinct from our own, and not governed by the same laws. Its intention to do so is placed beyond question by the proviso to section 1 of the Philippine act, that section 1891 of the Revised Statutes, providing that "the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States," should not apply to the Philippine Islands.

That the postal service in the Philippines was included in this separation is not to be doubted. As has been shown, Congress, in section 1 of the Philippine act, also ratified and approved the act of the Philippine Commission of September 6, 1901, providing for the organization of four

executive departments of government in those islands, by section 2 of which it was provided that "the department of commerce and police shall have under its executive control \* \* \* the bureau of post-offices."

Thus at the time of the passage of the act of July 1, 1902, the Philippine postal service was under the management and control of the Philippine Government.

A proper construction of the Executive order of July 21, 1898 (promulgated in General Orders of the War Department, No. 105, July 23, 1898), under the authority of which the postal service was extended to the insular territory acquired from Spain, will be found to confirm this view. That order provided:

"In view of the occupation of Santiago de Cuba by the forces of the United States, it is ordered that postal communication between the United States and that port, which has been suspended since the opening of hostilities with Spain, may be resumed subject to such military regulations as may be deemed necessary.

"As other portions of the enemy's territory come into the possession of the land and naval forces of the United States, postal communication may be opened under the same conditions.

"The domestic postal service within the territory thus occupied may be continued on the same principles already indicated for the continuance of the local municipal and judicial administration, and it may be extended as the local requirements may justify under the supervision of the military commander.

"The revenues derived from such service are to be applied to the expenses of conducting it, and the United States postage stamps are therefore to be used.

"The Postmaster-General is charged with the execution of this order in co-operation with the military commander, to whom the Secretary of War will issue the necessary directions."

The primary object of this order, it will be observed, was the opening of postal communication between the United States and such portions of the enemy's territory as came

into its possession. The accomplishment of this object was imposed upon the Postmaster-General, who was to co-operate with the military commander in the territory thus occupied for that purpose. As to the domestic postal service in such territory, no such co-operation was required. The continuance and extension of that service was committed exclusively to the charge of the military commander. Thus the delimitation of the Postmaster-General's authority under this order was clearly marked, and any conflict between him and the Secretary of War as to the management of affairs in such territory avoided.

It follows from what has been said, that the postal service in the Philippine Islands is not subject to the general laws of the United States regulating the mails under your administration. It therefore becomes unnecessary to inquire whether act No. 179 of the Philippine Commission, which relates simply to the official mail of insular and provincial officials "carried from one point in the Philippine Islands to another," is in harmony with the regulations prescribed by the laws of the United States on that subject.

Official mail matter coming from the Philippines through the service under your control should, however, comply with the laws of the United States relating thereto; and the question is suggested as to the endorsement which such matter should bear.

Section 5 of the act of Congress of March 3, 1877 (19 Stat., 335), provides that it shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to the business of the Government, "provided, that every such letter or package to entitle it to pass free shall bear over the words 'Official Business' an endorsement showing also the name of the Department, and, if from a bureau or office, the names of the Department and bureau or office, as the case may be, whence transmitted." (By section 6 the penalty for the unlawful use of such envelopes is also required to be stated.)

It is to be observed that, under the instructions to the Philippine Commission of April 7, 1900, and the Executive Order of June 21, 1901, the powers and duties thereby con-

ferred upon the commission and the civil governor were to be exercised under the direction and control of the Secretary of War; and that by the act of July 1, 1902, ratifying and confirming the instructions and order referred to, Congress continued this relation. It is also to be noted, in this connection, that by section 86 of the Philippine act, the commission are required to make annual report of all their receipts and expenditures to the Secretary of War; while section 87 continues, until otherwise provided, the division of insular affairs of the War Department organized by the Secretary of War, and provides that "the business assigned to said bureau shall embrace all matters pertaining to civil government in the island possessions of the United States subject to the jurisdiction of the War Department."

In view of these provisions, it seems to me a reasonable inference that, until otherwise provided, Congress intended that the government for the Philippine Islands, authorized and approved by the act of July 1, 1902, should be regarded as a branch of the War Department. The penalty envelopes used by its officers should therefore be endorsed accordingly.

Respectfully,

JOHN K. RICHARDS,  
*Solicitor-General.*

Approved:  
P. C. KNOX.

The POSTMASTER-GENERAL.

---

#### SUB-LETTING OF MAIL CONTRACT.

Where a person who has contracted with the Government to carry the mails over several routes enters into an agreement with a third person, without the consent of the Postmaster-General, to perform the whole service he has contracted to perform with regard to one of the routes, and is to receive the whole compensation allowed therefor, such agreement is a sub-contract within the meaning of the act of May 17, 1878 (20 Stat., 62), and the regulations of the Post-Office Department thereunder.

DEPARTMENT OF JUSTICE,  
*December 3, 1902.*

SIR: I have the honor to reply to your note of August 19, 1902, with its inclosures, in which you request my opinion



upon the question whether the agreement of John R. Carter with Moses Landry, which you submit, is a sub-contract within the meaning of the law forbidding the sub-letting or transfer of contracts for carrying the mails.

The situation is this: On January 1, 1902, the Post-Office Department, having advertised according to law for proposals for carrying the mails on certain routes, accepted the proposals of John R. Carter to carry the mails on four separate routes at the same time, including the route here in question, and a contract was accordingly made with him for that route.

The act of May 17, 1878 (20 Stat., 62), forbids the "sub-letting or transfer of any mail contracts \* \* \* without the consent, in writing, of the Postmaster-General," and provides that in case of such sub-letting or transfer without such consent the contract shall be considered as violated and the service may be again advertised. The advertisement for proposals, the proposal of Carter in this case and his contract also forbid such sub-letting or transfer of the contract, and provide that the contractor shall reside upon or contiguous to the route for which he contracts and give his personal supervision to the performance of the service; and the question submitted is whether this contract with Landry is a sub-letting or transfer of Carter's contract with the Government.

The original contract between Carter and the Government is for the carrying of mail over a certain route, upon certain conditions, during a certain period, and with a specified compensation for the service. By the contract between Carter and Landry the latter agrees to perform in whole the service for which Carter had contracted. Every stipulation respecting the actual execution of the work in Carter's contract with the Government is to be found in the Landry contract, and the same compensation allowed to Carter is agreed to be paid to Landry. The Landry contract, therefore, seems to come fairly within the meaning of the term sub-contract as defined by the authorities.

But it does not seem to me necessary to investigate the learning on the distinctions between a dependent or independent contractor and the mere servant relation, growing

chiefly out of cases of liability for damages or injuries to third parties, for I think the law before us plainly disposes of the present question by its terms.

Section 3 of the act of 1878 provides that when any person shall lawfully sub-let a mail contract, or lawfully *employ* any other person to perform the service or any part thereof, he shall file a copy of his contract, etc. By this it is, I think, intended that any employment beyond the mere casual and temporary hiring of vehicles, etc., calls for a formal agreement to be filed, and constitutes a subordinate arrangement which falls under the head of a sub-contract, and as such must receive the consent of the Postmaster-General in order to be lawful. To sub-let a contract and to employ another to perform the entire service or some substantial and integral part thereof, are in effect synonymous acts in the contemplation of this law. Even if there were an abstract doubt whether Carter had "sub-let" his contract, the instructions to bidders, based upon the established executive construction of the law, sustain the view just stated. Paragraphs 68 and 70 show that in order to delegate his duty to another, or before making a sub-contract, a contractor must secure the permission of the Postmaster-General. There can be no reasonable doubt that Carter's arrangement with Landry is fairly typical of the subordinate relations included in the intent of Congress. If this is not a "sub-contract" within the meaning of the act, whether it is or is not the "sub-letting" of a contract, it is difficult to say what the scheme of Congress does mean and include.

It appears to me to be the manifest policy and intention of Congress to commit to the Post-Office Department full control of all manner of subordinate arrangements and employments for carrying the mails, without respect to highly technical terms and distinctions of law. I therefore think that Carter's agreement with Landry was such a sub-letting of the service as is forbidden by the law and his contract thereunder, except upon the consent which was not obtained. That Carter himself understood it in that light is evident from the language used in his various communications, quoted by you. I am of opinion, therefore, that the agreement thus entered into is a sub-contract within the meaning

of the statute and the regulations of the Post-Office Department thereunder.

Very respectfully,

P. C. KNOX.

The POSTMASTER-GENERAL.

---

CHINESE LABORER—RETURN CERTIFICATE.

The act of April 29, 1902 (32 Stat., 176), extending the provisions of the Chinese-exclusion laws, and expressly reenacting section 7 of the act of September 13, 1888 (25 Stat., 477), continued existing laws only "so far as the same are not inconsistent with treaty obligations."

As heretofore held by this Department (21 Opin., 357; 23 Opin., 545), Article II of the treaty with China of 1894 displaced the provisions of section 7 of the act of 1888 with regard to the certificate of disability which must be presented by a registered Chinese laborer returning to the United States after an absence of more than one year.

DEPARTMENT OF JUSTICE,

*December 4, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of November 3, with its inclosures, in which you ask me relative to certain cases actually arising, whether the act of April 29, 1902 (32 Stat., 176), extending the provisions of the Chinese exclusion laws, and expressly reenacting section 7 of the act of September 13, 1888, revived said section so as to make its provisions the controlling legislation respecting the certificate of disability which must be presented by a registered Chinese laborer returning to the United States after an absence of more than one year.

Article II of the treaty of 1894 provided that the facts showing disability, by reason of sickness or other cause, preventing a laborer from returning within one year from the date of leaving the United States, should be certified by the "Chinese consul at the port of departure," which has been held to be the proper consul of China in this country. (21 Opin., 357; 23 Opin., 545.) Section 7 of the act of 1888 made the consular representative of the United States at the port of departure in China the proper authority to certify the facts as to disability. In 23 Opin., 545, I held that the rule of the treaty on this point had displaced the rule of section 7.

There are other provisions of section 7 of the act of 1888 upon which its express reenactment and extension in the act of 1902 may take effect, and the latter act expressly continued existing laws only "so far as the same are not inconsistent with treaty obligations." I do not think, therefore, that the effect of the act of 1902 requires any reversal or modification of the conclusion on the point presented reached by my predecessor and myself.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

---

JURISDICTION—COURT OF CLAIMS—BOWMAN ACT.

Where, upon an appeal to the Comptroller of the Treasury from certain disallowances made by the Auditor for the War Department in the settlement of the accounts of a disbursing officer of the Army, the Comptroller is unable, because of disputed questions of fact, to determine the question presented, and certifies such fact to the Secretary of the Treasury, the latter officer has no authority, under section 1063, Revised Statutes, to direct that the matter be referred to the Court of Claims for trial and adjudication, it not being a claim within the meaning of that section.

In its present status, it is such a matter as is contemplated by section 2 of the Bowman Act (22 Stat., 485.). Under the latter section, provision is made for advisory action only without the entry of judgment, while by section 1063, Revised Statutes, the court must have jurisdiction of the matter so as to be able to render judgment therein.

DEPARTMENT OF JUSTICE,

*December 10, 1902.*

SIR: I have the honor to acknowledge receipt of your communication of November 28, transmitting a copy of a letter of the Comptroller of the Treasury addressed to yourself, setting forth a question which has arisen in his office upon an appeal to the Comptroller from certain disallowances made by the Auditor for the War Department in the settlement of the accounts of a disbursing officer of the Army, and requesting my opinion "whether the Secretary of the Treasury is authorized to certify the matter in question to the Court of Claims under the provisions of section 1063, Revised Statutes."

The facts as stated in the letter of the Comptroller of the Treasury above referred to are:

“The Auditor for the War Department, in the settlement of the accounts of Francis B. Jones, major and quartermaster, U. S. Army, and general superintendent of the U. S. army transport service at New York City, disallowed for the period of December, 1899, January and April, 1900, and March, 1901, in said accounts vouchers purporting to represent payments in the sum of \$65,270.17 made by him as disbursing officer for certain repairs made on certain Government transports repaired under his direction, the said Jones being not only the disbursing officer in making such payment, but the officer representing the Government in making the contracts, and under whose general direction and superintendency such repairs were made; that the bulk of said disallowances made by the Auditor above cited were made by him upon the ground that they represented duplicate payments made to the contractors for the repairs of said vessels, which fact of duplicate payment is denied by said Jones and by the contractors.

“After a careful investigation of all the evidence at my disposal I am unable to arrive at an intelligent conclusion as to the truth or falsity of the claim of the Auditor that such disallowed items are duplicate payments.

“Colonel Jones has appealed from the action of the Auditor for the War Department to this office for a revision of the action of the Auditor in making such disallowances.

“The matter presents controverted questions of law and disputed facts, such as contemplated by section 1063, Revised Statutes, yet I am in doubt as to whether this section is broad enough in its terms to justify me as Comptroller in certifying this case to you for reference to the Court of Claims to be there proceeded with as other cases pending therein.

“My doubts arise as to whether section 1063, *supra*, is not confined to claims proper, namely: Independent demands against the Government as contradistinguished to a demand for a credit in the account of a disbursing officer as is the present matter. I am inclined to take the view that the statute is broad enough in its terms to cover a disallowance of the kind in question.”

Section 1063, Revised Statutes, reads as follows:

“Whenever any claim is made against any Executive Department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, the head of such Department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall there be proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim, of the character, amount, or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court, for trial and adjudication: *Provided*, That no case shall be referred by any head of a Department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.”

It seems clear from the proviso of the above section that this matter is not such a one as may be referred by you to the Court of Claims pursuant to the said section. In its present status the matter is not a claim against the United States for the payment of money to the disbursing officer growing out of any contract, express or implied, between himself and the United States, but is merely a question of the adjustment of the accounts of a disbursing officer who claims that he should be allowed certain credits which have been disallowed by the accounting officer. If these disallowances should be affirmed by the Comptroller of the Treasury the disbursing officer would still have no enforceable claim against the United States. On the contrary, he himself would be subject to an action on behalf of the United States for the collection of the amount of such disallowances

unless he should voluntarily make good the same by payment into the Treasury of the United States. Accordingly, if this matter should now be referred to the Court of Claims it would not present a state of facts which would give the court jurisdiction of the same as though the claim had been made the subject of an original action in that court. The claimant, in order to maintain such an action in the Court of Claims, would first be obliged to pay into the Treasury of the United States the amount in dispute. But this essential fact is at present lacking in the case. In its present status it is such a matter as is contemplated by section 2 of the Bowman Act (22 Stat., 485), which provides:

“That when a claim or matter is pending in any of the Executive Departments which may involve controverted questions of fact or law, the head of such Department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the Department by which it was transmitted for its guidance and action.”

It will be observed that by the above section provision is made for advisory action only without the entry of any judgment in behalf of the claimant, whereas by section 1063 the court must have jurisdiction of the action so as to render judgment therein. And such judgment must be “for money found due from the Government to the petitioner.” (*United States v. Alire*, 6 Wall., 573; *United States v. Jones*, 131 U. S., 17-18; see also *Billings v. United States*, 23 Ct. Cls. R., 174.)

I am therefore of the opinion that the matter in question is not such a one as the Secretary of the Treasury is authorized to refer to the Court of Claims under the provisions of section 1063, Revised Statutes.

Very respectfully,

JOHN K. RICHARDS,  
*Acting Attorney-General.*

The SECRETARY OF THE TREASURY.

CONFINEMENT OF FILIPINO CONVICTED IN CONSULAR  
COURT IN CHINA.

There is no warrant of law for confining in a Philippine prison a Filipino sailor convicted in the United States consular court at Shanghai, China, of the murder of a Chinaman on the U. S. Army transport *Listrom*, and sentenced to fifteen years' imprisonment.

Section 5546, Rev. Stat., as amended by the act of March 3, 1901 (31 Stat., 1451), or without the amendment, contains nothing to indicate that Congress considered the home or domicile of a convict in providing for his confinement, or that in speaking of a "convenient State or Territory" the Philippine Islands were in contemplation.

DEPARTMENT OF JUSTICE,

*December 29, 1902.*

SIR: I have received your request of the 20th instant for an opinion, as follows:

"The Department on December 1, 1902, received a telegram from the consul-general of the United States at Shanghai, China, stating 'Three Filipino sailors, army transport *Listrom*, charged with killing Chinaman. Can I take jurisdiction?' To this telegram the Department replied the same day, 'Opinion Department you have jurisdiction.' The consul-general now telegraphs under date of the 19th instant, 'Filipino murderer sentenced fifteen years imprisonment; recommend to instruct me send him Philippine prison by transport *Wright*, leaving here 30th.'

"I have the honor to ask whether in your opinion the consul-general may be instructed as he suggests, and whether the expenses of transporting the prisoner to a prison in the Philippines can be properly charged against the appropriation for bringing home criminals."

The present law concerning the transportation and confinement of prisoners convicted in consular courts is the amended section 5546 of the Revised Statutes, which was amended "so as to read," as given in 31 Statutes, 1451.

The changes made by that form of amendment are to be regarded usually as not changing the whole scope and spirit of the law, but rather as confined to the specific alterations of omission or addition in the old law.

Section 5546 provided that—

"All persons who have been, or who may hereafter be, convicted of crime by any court of the United States, includ-



ing consular courts, whose punishment is imprisonment in a district or Territory or country where, at the time of conviction, or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts or available therefore, shall be confined during the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney-General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the district or Territory where the conviction has occurred." \* \* \*

The specific alterations are: Adding after the words "any court of the United States" the words "including consular courts;" after the words "district or Territory" the words "or country;" and after the words "where the conviction has occurred" the words "and in case of convictions by a consular court the transportation shall be by some properly qualified agent or agents designated by the Department of State," etc.

It is clear that section 5546, in speaking of "a convenient State or Territory," did not include the Philippine Islands, and it is equally clear that the specific amendments, which do not alter the words "convenient State or Territory," and indicate no intent beyond including consular courts among the courts of the United States whose convicts were intended to be provided for, contain nothing from which it can be inferred that the Philippine Islands were in contemplation.

It is equally clear that section 5546, amended or not amended, contains nothing to indicate that Congress was considering the home or domicile of the convict in providing for his confinement in a suitable jail or penitentiary.

The Philippine organic act (section 1) contains the following:

"The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands."

The section referred to is the one extending the Constitution and laws to the Territories.

For these reasons, I am of opinion that there is no warrant of law for confining the murderer referred to in a Filipino prison, and this makes it unnecessary to answer the other question.

Respectfully,

P. C. KNOX.

The SECRETARY OF STATE.

---

#### ENTRY OF GOODS BEARING FOREIGN TRADE-MARK.

The importation into the United States of an article bearing the genuine trade-mark of the maker, by an importer who is not the owner of the trade-mark, is not forbidden by section 11 of the tariff act of July 24, 1897 (30 Stat., 207), although such trade-mark has been properly registered in the United States and all rights thereunder have been transferred and belong to another party.

The purpose of that section is twofold: to protect the domestic manufacturer against encroachment upon his trade-mark, and the public from the imposition of imported articles assuming domestic names. It is the simulation or counterfeit, and not reality or genuineness at which the section is aimed.

#### DEPARTMENT OF JUSTICE,

*December 29, 1902.*

SIR: I have your favor of October 2, 1902, which, with its inclosures, states the following case:

Hamley Brothers, of London, England, registered in the United States Patent Office, August 6, 1901, a trade-mark "Ping Pong" for a game. Later, March 21, 1902, they transferred their rights in the trade-mark, in all territory belonging to the United States, to Parker Brothers, incorporated, of Salem, Mass., by assignment recorded in the United States Patent Office April 7, 1902.

In the same month Parker Brothers, incorporated, recorded this trade-mark under section 11 of the act of July 24, 1897, and copies were sent to the proper customs officers at various ports.

In the succeeding month, May, 1902, Illfelder & Co., of New York, imported there certain sets of a game called

"Ping Pong," which Parker Brothers, incorporated, request your Department to exclude from entry.

You invite an expression of my views whether upon these facts the importation shall be admitted to entry.

The section referred to is in these words:

"That no article of imported merchandise which shall copy or simulate the name or trade-mark of any domestic manufacture or manufacturer, or which shall bear a name or mark, which is calculated to induce the public to believe that the article is manufactured in the United States, shall be admitted to entry at any custom-house of the United States. And in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer who has adopted trade-marks may require his name and residence and a description of his trade-marks to be recorded in books which shall be kept for that purpose in the Department of the Treasury, under such regulations as the Secretary of the Treasury shall prescribe, and may furnish to the Department fac-similes of such trade-marks; and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of the customs."

Its purpose is twofold: to protect the domestic manufacturer against encroachment upon his trade-mark, and the public from the imposition of imported articles assuming domestic names.

But as to trade-marks—it is a copy, not an original, a simulation, or counterfeit, not reality or genuineness at which the statute is aimed; and where there is no trade-mark the name or mark must, in itself, be such as is "calculated to induce the public to believe" that the article is made here.

If, therefore, the importation in question bears the genuine trade-mark of Hamley Brothers, the entry should be allowed.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL—OPINION.

The Comptroller of the Treasury, rather than the Attorney-General, should pass upon the question of the power of refund and payment out of the Treasury of duty overpaid on an importation of merchandise. Opinions of March 26, 1901 (23 Opin., 431), and July 20, 1901 (23 Opin., 468), followed.

DEPARTMENT OF JUSTICE,

*December 30, 1902.*

SIR: Your favor of October 28, 1902, submitting the request of Faxon, Williams & Faxon, of Buffalo, N. Y., for refund of duty overpaid on mushrooms, invites an expression of opinion which it seems hardly proper or advisable to give.

I am of opinion that this question, involving the power of refund and payment out of the Treasury, should be passed upon by the Comptroller of the Treasury rather than by myself. (23 Opin., 431; id., 468.)

I have the honor, therefore, to return the papers to you for the disposition suggested.

Very respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

---

CHINESE SEAMEN—TRANSFER OF CREW—ALIEN  
LABORERS.

The Chinese exclusion laws and the alien contract labor laws have no application to seamen who, in good faith, are engaged in navigation, and who are temporarily within a port of the United States for that purpose. The transfer of the Chinese crew of the Danish steamer *Arab* to the Danish steamer *Stanley Dollar*, and of a Chinese crew from a vessel of the Pacific Mail Steamship Line to the steamer *Siberia*, of the same line, under the conditions stated, would not involve a violation of either of those laws.

Opinion of August 29, 1902 (ante, p. 111), adhered to.

DEPARTMENT OF JUSTICE,

*December 31, 1902.*

SIR: I have the honor to acknowledge the receipt of your letter of December 24, in which you state that the *Dollar*

Steamship Company, the agent, manager, and consignee at the port of San Francisco of a line of steamers plying between that port and Hongkong, China, have made application to you for permission to transfer in that port from the Danish steamer *Arab*, of its line, a crew of 40 Chinese persons to the Danish steamer *Stanley Dollar*, to form a part of the crew of the latter vessel; and that the Pacific Mail Steamship Company, operating between the same ports a line of vessels, chartered under the navigation laws of the United States, has made a similar application for permission to transfer a Chinese crew from one of its vessels to the *Siberia* to act as the crew thereof on the outbound initial voyage of said vessel. You request my opinion upon the following points:

First. Would the transfer of the Chinese crews, permission for which is requested by the Dollar Steamship Company and the Pacific Mail Steamship Company, involve a violation of the Chinese exclusion laws; and

Second. If such transfer can lawfully be made, would the employment of a Chinese crew, engaged abroad, upon the *Siberia* on its initial outward-bound trip, constitute a violation of the alien contract labor laws, notwithstanding the terms of their employment, since the *Siberia* is chartered under the navigation laws of the United States?

Both of these questions were answered by this Department on August 29, last, in an opinion requested by you in the matter of the transfer of the crew of the *City of Peking* to the *Korea*. In that opinion I held "that the alien contract labor laws have no application to Chinese or other foreign seamen." "The bare landing of the (Chinese) crew of the *City of Peking* (if it is to be considered a 'landing' at all) in order that they may reship upon the *Korea*, would not, in my opinion, violate the treaty and laws in relation to the exclusion of Chinese." I therefore concluded that there was no legal objection to permitting the Chinese crews in that case "to come ashore under proper custody and safeguards" for the purpose of reshipment as the crew of another steamer of the same line for the return voyage. It may be unnecessary for me to add that these conclusions had

reference only to seamen who were engaged in good faith in the business of navigation; for while the exclusion acts referred to have no reference to seamen, whose presence in this country is but temporary and for the purposes of navigation, yet it is obvious that aliens otherwise excluded by law can not be brought within this country to remain here permanently under any pretense that they are brought here as crews.

In this connection I refer you to my opinion given to your Department on September 10, 1901 (23 Opin., 521). I mention this, as your request for an opinion does not state any facts with reference to the present applications for leave to transfer crews. I therefore can not express any opinion as to whether the crews now under consideration should be transferred. This opinion has no further purpose than to advise you that this Department adheres to its opinion of August 29, that the Chinese exclusion laws and the alien contract labor laws have no application to seamen, who in good faith are engaged in navigation, and who are temporarily within a port of entry for that purpose. The application of these principles to the facts of particular cases is a matter of administrative judgment, which may involve questions of fact as to the good faith of the application, and upon such exercise of judgment I am not called to, and therefore do not, express any opinion.

I find nothing in the cases of *Fok Yung Yo v. U. S.* (185 U. S., 296) and *Lee Gon Yung v. U. S.* (185 U. S., 306) in conflict with the views above stated. These cases have reference to Chinese laborers who came to the United States as passengers, and therefore have no application to cases of Chinese seamen.

The papers with your letter of transmittal are herewith returned.

Respectfully,

JAMES M. BECK,  
*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

## ATTORNEY-GENERAL—OPINION.

The Attorney-General declines to express an opinion upon the question whether the joint resolution of July 1, 1902 (32 Stat., 750), construing the pension act of June 27, 1890 (26 Stat., 182), has any retroactive force, for the reason that the question is not predicated upon an actual case arising in the Interior Department, and for the further reason that that Department has an officer clothed with authority to determine questions of that nature, in the first instance, coming up on appeal from the Pension Bureau.

DEPARTMENT OF JUSTICE,  
*January 2, 1903.*

SIR: Your request of July 12, and subsequent correspondence, submit for my opinion the question whether the joint resolution approved July 1, 1902, construing the pension act of June 27, 1890, has a retroactive force.

It does not appear that this question is predicated on an actual case which has arisen in your Department, although there is among the papers submitted a statement of a *pro forma* case which does not refer to any particular individual. Upon this ground I must respectfully decline to comply with your request (19 Opin., 332; 20 Opin., 536; 21 Opin., 109; *id.*, 568), and on the further ground that it seems in the organization of your Department an officer thereof is clothed with authority to determine questions of this nature, in the first instance at least, coming up on appeal from the Pension Bureau.

Very respectfully,

JOHN K. RICHARDS,  
*Acting Attorney-General.*

The SECRETARY OF THE INTERIOR.

---

CUSTOMS LAWS—COLLECTION OF DUTY ON GOODS PROHIBITED FROM ENTRY.

The Treasury Department is not required by the statutes to levy and collect duty or its equivalent on goods, the importation of which is specifically and absolutely prohibited.

DEPARTMENT OF JUSTICE,  
*January 6, 1903.*

SIR: Your letter of August 18, 1902, refers to certain decisions of the courts (*Gray v. United States*, 113 Fed.

Rep., 213; *Baldwin v. United States*, Id., 217), and to an opinion of my own dated March 12, 1902, and proceeds to call my attention to the case of *McLane v. United States*, 6 Pet., 427, in which it was held that—

“In point of law, no duties, as such, can legally accrue upon the importation of prohibited goods; they are not entitled to entry at the custom-house or to be bonded. They are *ipso facto* forfeited, by the mere act of importation. \* \* \* It is impossible, in a legal sense, to sustain the argument, that the importation could be deemed innocent, and the Government could be entitled to duties, as upon a lawful importation. It was entitled to the whole property, by way of forfeiture; and to nothing by way of duties.”

Thereupon you ask my opinion on the following questions:

1. Whether the Treasury Department is required by the statutes to levy and collect duty or its equivalent on prohibited goods—by which you refer to goods the importation of which is specifically and absolutely prohibited. I answer this question in the negative.

2. Whether in all other cases of seizure for violation of the customs revenue laws the Department is authorized to levy and collect a fine equivalent to and in lieu of duty, and treat the collection as a fine, or to levy and collect duty and to account for the collection as duty. As to your second query, I must respectfully request a specific statement of “all other cases of seizure” to which you refer before I give my opinion.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

---

AWARD OF CONTRACT FOR COAL FOR POST-OFFICE  
DEPARTMENT.

Section 412, Revised Statutes, does not prohibit the Postmaster-General from awarding a contract for furnishing coal for his Department to a firm, it being the lowest bidder, one of the members of which is an officer of that Department; but if the contract was one for “carrying the mail,” it clearly would be within the general prohibition of that section.



Nor does section 1783, Revised Statutes, prevent the awarding of such contract to the firm, if the officer does not "act as an officer or agent of the United States" with reference to the purchase of the coal. That section, being quasi-penal in character, must be strictly construed; and, under such construction, a partner can not be held to be an "agent," for he is a principal, and the act is essentially the act of principals.

While there is no statute forbidding the Postmaster-General from awarding the contract to such firm, he is under no legal obligation to do so. As the question of the acceptance of any bid is a matter of administrative judgment and discretion, the Attorney-General is without authority or obligation to express an opinion with reference to it.

DEPARTMENT OF JUSTICE,

*January 15, 1903.*

SIR: I have the honor to acknowledge the receipt of your letter of the 8th instant, in which you ask my opinion as to whether you can award a contract for the purchase of coal for the use of your Department under the following circumstances:

On December 30, 1902, sealed proposals were invited for furnishing the Post-Office Department with bituminous coal for the remainder of the fiscal year ending June 30, 1903. An advertisement was placed therefor in three Washington papers, and a typewritten copy thereof was sent to about twenty-two coal dealers. Four bids were submitted in response thereto, the lowest being that of Machen Brothers, who propose to furnish 2,000 tons (the amount probably needed by the Department for the balance of the present fiscal year) for \$5.75, which is \$2.55 per ton cheaper than the next lowest bid. You state that the proposal is properly executed, and that no question has arisen in this respect. The fact is presented, however, that the firm of Machen Brothers is composed of William A. Machen and August W. Machen, the latter being Superintendent of Free Delivery in the Post-Office Department.

The question thus submitted involves a construction of the following sections of the Revised Statutes:

"SEC. 412. No person employed in the Post-Office Department shall become interested in any contract for carrying the mail, or act as agent, with or without compensation, for any contractor or person offering to become a contractor,

in any business before the Department; and any person so offending shall be immediately dismissed from office, and shall be liable to pay so much money as would have been realized from said contract, to be recovered in an action of debt, for the use of the Post-Office Department."

"SEC. 1783. No officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm; and every such officer, agent, or member, or person, so interested, who so acts, shall be imprisoned not more than two years, and fined not more than two thousand dollars nor less than five hundred dollars."

In my judgment, section 412 does not forbid you from awarding the contract to the firm of Machen Brothers. If the contract was one "for carrying the mail" it would clearly be within the general prohibition which forbids any employee of the Post-Office Department from having any interest in such a contract. Congress did not see fit, however, to apply such general prohibition to every kind of a contract, but limited its inhibition to the special kind of contract above referred to. It did, however, prohibit any employee from acting "as agent, with or without compensation, for any contractor or person offering to become a contractor, in any business before the Department."

The statute is in derogation of common right, and is quasi-penal in character. It provides for the immediate dismissal of any post-office employee who does act as such agent, and subjects him to a heavy liability. It must, therefore, be strictly construed. Under such construction a partner can not be held to be an "agent," for he is a principal, at least in making a joint bid for a contract. The act is essentially the act of principals. Without deciding that a partner could not act as the "agent," within the meaning of the act of Congress, for the firm of which he is a member in the transaction of business before your Department, I am of the opinion that the mere joinder with his partner as principals

in a bid for a contract does not make him such "agent," and section 412 does not apply.

Referring to Revised Statutes, section 1783, you do not state in your letter the exact nature of Mr. Machen's duties, except that he is General Superintendent of the Free-Delivery System. I assume, for the purposes of this opinion, that he has no official relation with the purchase of coal for the use of the Department, and if this be the fact, section 1783 is inapplicable, for Mr. Machen as such superintendent does not "act as an officer or agent of the United States" with reference to such purchase of coal.

The general question as to the right of executive officers to contract as principals with the Government was discussed by Attorney-General Williams in an opinion (14 Opin., 483) in which, after referring to sections 1781 and 1782, he says (p. 484):

"But there is not in the statutes any *general* prohibition which prevents executive officers from contracting directly with the Government, as principals, in matters entirely separate from their offices and in no way connected with the performance of their duties as officers of the Government; nor are they forbidden to be connected with such contracts, after they are procured, by acquiring an interest in them. And here there is a marked difference made in the legislation of Congress between the members of that body and the executive officers of the Government. Both classes come under the prohibition of the laws above cited. But in the act of 1808 (2 Stat., 484; Rev. Stats., sec. 3739), which strictly prohibits all interest in, and all connection, as principals, with Government contracts, Members of Congress and Delegates only are mentioned as coming within the intention.

"From this statement it is clear that it has not been the purpose of Congress to prohibit executive officers in general from being, as principals, connected with Government contracts, nor, except as above pointed out, from acquiring interests in them. There is not in the statutes any such prohibition applying to United States pension agents."

While I am, for the reasons stated, of the opinion that you are not forbidden by any statute from awarding the

contract under consideration to the lowest bidder, I must not be understood as advising you that you are under any legal obligation to do so. I know of no law which requires you to award a contract of this character to the lowest bidder. The acceptance of any bid is a matter of administrative judgment and discretion, and you are at liberty, for any reason that in your judgment is to the public interest, to disregard any bid. The matter is one of administrative judgment and discretion, and as such I am without either authority or obligation to express any opinion with reference to it.

Respectfully,

P. C. KNOX.

THE POSTMASTER-GENERAL.

---

STATUTORY CONSTRUCTION—CHINESE EXCLUSION LAWS.

Section 2 of the act of April 29, 1902 (32 Stat., 176), which empowers the Secretary of the Treasury, with the approval of the President, to appoint such agents as he may deem necessary for the efficient execution of the Chinese treaty and Chinese exclusion laws, does not repeal by implication the provisions of the various previous acts in relation to the exclusion of Chinese, vesting in the collector of customs and his deputies the power to enforce the provisions of those laws, but is to be regarded as additional legislation on the subject and in harmony therewith.

The agents to be appointed by the Secretary of the Treasury under the above-named act are not to supersede the collectors in the performance of their duties regarding the admission of Chinese, but constitute an additional force to act in co-operation with them in securing an effective enforcement of the law.

Repeals by implication are never favored. There must be a positive repugnancy between the old and the new law to work an implied repeal. If possible, the two laws should stand together.

DEPARTMENT OF JUSTICE,

*January 21, 1903.*

SIR: In your letter of December 4, 1902, you state that various provisions of the Chinese exclusion laws designate the collectors of customs at the ports of entry as the administrative officers responsible for the enforcement of law respecting the admission of Chinese persons into the United States. For instance, sections 3 and 4 of the act of

1882, as amended by the act of 1884, impose certain duties upon collectors of customs acting in person or by deputy, and section 12 of the act of September 13, 1888 (25 Stat., 478), provides—

“That before any Chinese passengers are landed from any such vessel, the collector, or his deputy, shall proceed to examine such passengers, etc.; and no passenger shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States.” \* \* \*

You also refer to section 2 of the act of April 29, 1902 (32 Stat., 176), providing—

“That the Secretary of the Treasury is hereby authorized and empowered, \* \* \* with the approval of the President, to appoint such agents as he may deem necessary for the efficient execution of said treaty and said acts.”

You ask for an expression of my opinion on the question whether the language last quoted can properly be considered such a repeal of the provisions of the various acts in relation to the exclusion of Chinese, of which section 12 of the act of 1888 is an example, as to authorize the appointment by you, with the approval of the President, of agents to perform the duties assigned heretofore under authority of law to collectors of customs.

The principle upon which the question depends is that of repeal by implication, which is never favored. The rule of construction is that there must be a positive repugnancy between the old and new law to work an implied repeal, and that if possible the two laws should stand together.

Applying these tests to the act of 1902, it seems to me that section 2 of that act is not intended to take the place of section 12 of the act of 1888 and similar provisions, but is to be regarded as additional legislation on the subject in harmony with and complementing the earlier provisions of law. There is nothing repugnant between the terms of the new act and those of former acts; the agents to be appointed by the Secretary of the Treasury are not to supersede the collectors of customs in the performance of their duties regarding the admission of Chinese. They

constitute an addition to your force, and are to act in cooperation with the collectors and other officers dealing with this subject, in order to secure effective enforcement of the law. My answer to your inquiry must accordingly be in the negative.

Very respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

---

#### LOTTERY—GIFT ENTERPRISE—SCHEME OF CHANCE.

The contracts issued by the Home Co-operative Company of Kansas City, Mo., provide for the payment of a membership fee of \$3, and succeeding monthly payments of \$1.35, \$1 of which is to be credited to the party paying the same and applied on the installment purchase of a home, the company agreeing that whenever the sum of \$50 shall have accumulated from these monthly payments, and from such payments on each like contract subsequently issued, the contract having the lowest number not then matured shall be deemed to have matured, and the owner thereof shall be entitled to an installment of \$50 per month to be applied on the payment of a home for such owner, until \$1,000 has been paid, when such contract shall be deemed to be fully performed. After the maturity of a contract, the monthly payments are increased to \$5.35, \$5 of which is to be placed to the credit of the party purchasing the home; and when the amounts so paid aggregate \$1,000, less the amount such owner has to his credit at the maturity thereof, then the lien of the company on the property is discharged and the title thereto vests in the owner of the contract. Each contract is to be numbered in the order of its acceptance and given the number next higher than the contract last made, the benefits of each contract beginning in numerical order after the fulfillment of the contracts of lower number.

*Held*, That the plan is a "gift enterprise or scheme for the distribution of money by chance," within the meaning of section 3894, Revised Statutes, as amended September 19, 1890 (26 Stat., 465), and, as such, the Postmaster-General is authorized, under sections 3929 and 4041, Revised Statutes, to exclude from the mails all matter connected with such business.

As the number given a contract when issued, and not the date of issue, determines its value, a contract bearing a low number will be much more valuable than one bearing a high number; and it being largely a matter of chance which contract will receive the lowest number, and consequently be of greater value, the elements of a lottery are clearly discernible in the scheme.

DEPARTMENT OF JUSTICE,  
January 22, 1903.

SIR: I have the honor to acknowledge the receipt of your letter of May 9, 1902, with its inclosures, in which you request my opinion whether the plan and methods of business of the Home Co-operative Company, of Kansas City, Mo., are such as to authorize the Postmaster-General to forbid the use of the mails in such business, as provided in Revised Statutes, sections 3929 and 4041, as amended (26 Stat., 465).

These sections, with section 3894, as amended, forbid the use of the mails for mail matter "conveying any lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or conveying schemes devised for the purpose of obtaining money or property by false pretenses," or "any lottery, gift enterprise, or scheme for the distribution of money or any real or personal property by lot, chance, or drawing of any kind," or "covering any other scheme or device for obtaining money or property of any kind through the mails by means of false or *fraudulent pretenses*, representations, or promises," and sections 3929 and 4041 authorize the Postmaster-General to prevent the delivery of any registered letter or the payment of money orders to persons engaged in such business, and the question submitted is whether the business of this company is of the character here described.

The Home Co-operative Company is a copartnership. In the contract issued by the company it is provided that—

"The parties of the first part (the company) shall number this contract in the order of its acceptance, which shall be the next number higher than the contract last made by the parties of the first part of like kind with anyone, and the *benefits of this contract shall begin in its numerical order after the fulfillment of the contracts of lower number* and according to the plan of co-operation of the party of the first part, as further described herein.

"The party of the second part shall pay to the parties of the first part the sum of three dollars (\$3.00) as a membership fee, and shall pay on this contract the sum of one dollar

and thirty-five cents each month, on or before the 10th day thereof; one dollar of which sum shall be kept and credited to the account of the party of the second part and applied on the installment purchases of homes according to the co-operative plan aforesaid; ten cents of said sum shall be kept as a reserve fund to meet contingent liabilities of the parties of the first part in performing these contracts, and twenty-five cents shall be taken to defray the expenses and for the compensation of the parties of the first part.

“Whenever there shall be accumulated by the parties of the first part the sum of fifty dollars from the payment of the sum of one dollar on this and like contracts made subsequent to this contract, *the contract having said lowest number not then matured, shall be deemed to have matured, to-wit, the owner of the contract having the said lowest number shall be entitled to an installment sum of fifty dollars per month,* to be applied on the payment of a home for such contract owner, until the sum of one thousand dollars (\$1,000.00) shall in this manner be paid, which shall continue with each maturing contract until this contract shall mature and the like sum paid. When the said sum of one thousand dollars (\$1,000.00) shall be paid for the benefit of the party of the second part, then this contract on the part of the parties of the first part shall be fully performed.

\* \* \* \* \*

“And the party of the second part shall pay to the parties of the first part the sum of five dollars and thirty-five cents (\$5.35) on or before the 10th day of each month; twenty-five cents (\$0.25) of which sum shall be for the expense of the parties of the first part in looking after said property, and the ten cents (\$0.10) to be placed in the reserve fund as aforesaid; said sum of five dollars (\$5.00) shall be put to the credit of the party of the second part, and shall go to pay off obligations of the parties of the first part for homes, as aforesaid.

“When the monthly payments of five dollars (\$5.00) shall aggregate the sum of one thousand dollars (\$1,000.00), less the amount the second party has to his credit before matu-



urity, then the lien of the parties of the first part shall be discharged and title to said property shall vest in the party of the second part."

It will be noticed that the number given the contract when it is issued, and not the date of its issue, determines the time and order of its maturity. The lower the number of the contract, the greater its value and desirability; therefore the number each contract happens to receive really determines its value.

The memorandum in reference to the plan and methods of this company, submitted by the Assistant Attorney-General for the Post-Office Department, contains the following:

"The greatest number of contracts issued by this company during any period of three consecutive days, up to the date of the examinations of its books and records, was 267, covering applications of over 160 patrons, from Kansas City, Mo., to Spokane, Wash. It was learned also that applications came straggling in from thirty to forty days after their date. Now, if this company were to write during the first month 267, or a greater number of contracts, and should issue no more thereafter, contract No. 1 would mature immediately, while the last one issued would not mature until many years later. The actuary of this company states that he has taken 50 contracts and figured the result on this basis, and found that while contract No. 1 would mature the second month, contract No. 46 would not mature until  $39\frac{1}{2}$  years thereafter; and that while contract holder No. 1 would have completed paying for his home in  $16\frac{3}{4}$  years after the last man started, the last man would be a patron of the company about 28 years longer."

It is incontrovertible that contract No. 1, mentioned in the above illustration, would be much more valuable than contract No. 46. It is equally incontrovertible that it would be largely a matter of chance which of fifty applications received at the same time would receive the lowest number. The elements of a lottery are therefore clearly discernible in this scheme, for there is a prize and a condition paid for a chance to obtain that prize.

An original action in the nature of quo warranto was brought in the supreme court of the State of Nebraska to annul the corporate existence of the Nebraska Home Company, a corporation existing under the laws of that State, and whose plan and methods of business were almost identically the same as the plan and methods of business of the Home Co-operative Company. On November 19, 1902, judgment of ouster was entered as prayed. After reviewing the contract of the company, the court said:

“Does this scheme involve the elements of a lottery? To constitute a lottery there must be a prize offered and the payment of something for a chance to obtain it. The Attorney-General has furnished the court with an ‘expert’s table,’ which is derived from a computation based upon the issuing of contracts upon 1,000 applications received at the same time and each holder paying his installments according to his agreement. We do not understand that defendant’s attorneys deny the accuracy of the result obtained upon the basis assumed, and it appears that the 22 holders of the lowest numbered contracts would get their first installments, respectively, within the first twenty month period after the contracts were made, and would receive the full sum of \$1,000 within the next twenty month period thereafter, whereas the holder of contract numbered 1000, although making his payments monthly, would not have any return from his investment until more than seventy years from the time he took his contract and began payment. The advantage of the fortunate holder of the early number is manifest. To obtain such a preference is to obtain something of value. ‘It is idle to say that a sum or an obligation for a sum due and payable to-day, or at an early day, is of no more value than an obligation for an equal amount without interest payable at a remote and indefinite time.’ (*McDonald v. United States*, 12 C. C. A., 144.) The question then is whether the element of chance enters into the scheme by which one contract holder obtains this advantage over another. The contracts are to be ‘numbered and dated in regular numerical order as applications are received at the home office.’ The applicant must take his chances as to

how many applications may be received at the same time that his is received, and, if there are several at the same time, he must take the chance of preference over other applications received with his.

\* \* \* \* \*

“The suggestion that the applicant will know the number of his contract before he accepts it and if not satisfied may reject the contract, is without merit. By his application he agrees to accept the contract and he is presumed to know the terms of the contract before he makes the application. The suggestion is predicated upon the idea that he will not perform the agreement that he has made in his application, but will forfeit the fee ‘for registering and issuing each application and contract’ and so risk only the \$3. If that is the proper construction of the contract the result is the same. It involves the payment of \$3 for the chance of obtaining an early number.”

In this opinion I concur. The similar scheme of the Home Cooperative Company may not be in a strict technical sense a lottery, but is a “gift enterprise or scheme for the distribution of money by \* \* \* chance,” and as such you are justified in excluding it from the mails.

This view of the case makes it unnecessary for me to determine whether the business is also “a scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, etc.” Fraudulent intent is generally a question of fact and for the reasons cited it is not necessary for me to express any opinion as to the good faith or bad faith of the promoters of this enterprise. Whatever their intent may have been, their scheme in its operation offends the provisions of the postal laws which forbid the use of the mails to further schemes in the nature of lotteries.

Respectfully,

P. C. KNOX.

The POSTMASTER-GENERAL.

IMPORTED LEAD BULLION—ASSAY—DRAWBACK.

The Attorney-General declines to modify the views and conclusion expressed in his opinion of May 15, 1902 (ante, p. 45), that paragraph 182 of the tariff act of July 24, 1897 (30 Stat., 166) requires the quantity of metal contained in imported lead bullion to be determined by official weighing only, and that the application of assay to lead bullion under the current Treasury Regulations for bonded smelters and refiners is without warrant of law.

The statutory percentages of refined metal for exportation may not properly be made up of "such portions of metals as the importer may determine."

DEPARTMENT OF JUSTICE,

*January 26, 1903.*

SIR: Your letter of January 7 suggests, in effect, the reconsideration of my opinion of May 15, last, relative to lead bullion, in the light of additional facts submitted on behalf of parties in interest.

I have carefully considered the various statements made, but am unable to perceive valid reasons for modifying the views and conclusion which I expressed in that opinion. It makes no particular difference that some importations of lead bullion or base bullion run lower in the percentage of lead and higher in that of antimony than the average, which shows 95 per cent or more of lead. The bond for the amount of duty, which is necessarily determined by gross weight under an enumeration *eo nomine* (paragraph 182, tariff act of 1897), may be liquidated on the exportation of 90 per cent of the metal contents ("the amount of imported metal," sec. 29 of said act), whether consisting of one or more metals beside the lead.

If I correctly understand your specific inquiry, whether the statutory percentage for exportation may not properly be made up of "such portions of metals imported as the importer may determine," this affirmation of my previous opinion requires an answer in the negative. If it should be urged by parties in interest, against the present construction of the law, that it involves onerous or impracticable results, they should be remitted to Congress.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

## ARMY OFFICER—JURISDICTION—CIVIL COURTS—MILITARY COURTS.

An officer in the Army of the United States who, while operating in the Philippines during the insurrection in those islands, and while the government of military occupation was in force therein, committed an offense against a native of those islands, was amenable only to the laws of war, and can not be tried by the civil courts of those islands or of the United States; and, having left the military service, he can not now be tried for the offense by a military court.

A court martial has no jurisdiction over an officer after he has left the service, and a military commission has no jurisdiction to try such officer now that peace has been proclaimed in the Philippines.

DEPARTMENT OF JUSTICE,

*January 26, 1903.*

SIR: I have your letter of November 21, reading as follows:

"I have the honor to transmit herewith the report of an investigation made by the Judge-Advocate-General of the Army, from which it appears that Father Augustine de la Pena, the parish priest at Dumangas, island of Panay, was subjected to torture by an officer of the volunteer forces, with a view to extort information in respect to the operations of the insurrectionary forces in that island; as a consequence of the administration of torture the victim died.

"An expression of opinion is requested as to whether Capt. Cornelius M. Brownell, by whose order and under whose personal supervision the torture was administered, is now amenable to a criminal prosecution therefor: and I remain,

"Very respectfully,

"ELIHU ROOT,  
"Secretary of War."

It appears from the inclosures of your letter that the torture and death referred to occurred in the month of December, 1900, at Banate, Iloilo Province; that Brownell, was then captain of Company D, Twenty-sixth Infantry, U. S. Volunteers; that he is no longer in the military service, and is now in the United States.

The alleged offense would, under our system of laws, be either murder or manslaughter, and under Spanish law assassination or homicide, according to the motives and circumstances.

The fact that it might be regarded as a violation of the laws of war is not sufficient to prevent it from being murder or manslaughter. (*Minnesota v. Gut*, 13 Minn., 341; *Gut v. State*, 9 Wall., 35.)

An offense may be one against the State and at the same time one against the United States. In that instance two sovereignties are offended by it. (*Coleman v. Tennessee*, 97 U. S., 518.)

It is also true that an offense may be one against the quasi sovereignty of a territory and one against the United States; also that a crime may be an offense under the rules or articles which govern the Army in peace and war, at home and abroad, and a different offense against the United States, a State, or Territory. (6 Opin., 416; Winthrop's Mil. Law, 2d ed., pp. 1076, 124, 396.)

It seems to be clear from the authorities that no military court can now try Captain Brownell.

(1) Because a court martial has no jurisdiction since he has left the service (5 Opin., 58); and

(2) Because a military commission has no jurisdiction now that peace has been proclaimed in the Philippines.

Upon the ratification of the treaty with Spain on April 11, 1899, the legal title to the Philippines was vested in the United States (183 U. S., 176). But the cession was completed under very extraordinary circumstances. Instead of peace, there existed in full operation a powerful insurrection against the new sovereignty, and the character or extent of this insurrection was not radically changed until after the commission of the act which constituted this alleged offense.

In *Coleman v. Tennessee* (97 U. S., 509), Coleman was indicted in the criminal court for the district of Knox County, Tenn., in October, 1874, for a murder alleged to have been committed in that county on the 7th of March, 1865. At the time the offense was alleged to have been committed he was a regular soldier in the military service of the United States, and East Tennessee, where the offense was alleged to have been committed, was then occupied by the armies of the United States as a military district. It was held that

when the armies of the United States were in the enemy's country the established military tribunals had, under the laws of war and statutory authority, exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service.

The court, speaking through Mr. Justice Field, said (p. 515):

"Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offenses committed by them. They were amenable only to their own Government, and only by its laws, as enforced by its armies, could they be punished. \* \* \*

"The fact that when the offense was committed, for which the defendant was indicted, the State of Tennessee was in the military occupation of the United States, with a military governor at its head, appointed by the President, can not alter this conclusion. Tennessee was one of the insurgent States, forming the organization known as the Confederate States, against which the war was waged. Her territory was enemy's country, and its character in this respect was not changed until long afterwards. \* \* \*

"The laws of the State for the punishment of crime were continued in force only for the protection and benefit of its own people."

In *Donn v. Johnson* (100 U. S., 158), the court said (p. 166:)

"Nor is the position of the invading belligerent affected, or his relation to the local tribunals changed, by his temporary occupation and domination of any portion of the enemy's country. \* \* \* The municipal laws—that is, such as affect private rights of persons and property and provide for the punishment of crime—are generally allowed to remain in force and to be administered by the ordinary tribunals as they were administered before the occupation. They are considered as continuing, unless suspended or superseded by the occupying belligerent. But their continued enforcement is not for the protection or control of the army or its officers or soldiers. These remain subject

to the laws of war, and are responsible for their conduct only to their own Government and the tribunals by which those laws are administered. If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal, except that of public opinion, which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression."

See also *State of Tennessee v. Hibdon* (23 Fed. Rep., 795.)

On August 14, 1898, a proclamation was issued "To the people of the Philippines" by the general in command at Manila, in which he said:

"The government established among you by the United States is a government of military occupation; and for the present it is ordered that the municipal laws, such as affect private rights of persons and property, regulate local institutions, and provide for the punishment of crime, shall be considered as continuing in force, so far as compatible with the purposes of military government, and that they be administered through the ordinary tribunals substantially as before occupation, but by officials appointed by the government of occupation."

The same proclamation declared that a provost-marshal-general should be appointed whose duties would be set forth in detail in future orders, but that in a general way he and his deputies were to be charged with the duty of making arrests and sending offenders before courts-martial, military commissions, provost courts, or native criminal courts, "in accordance with the law and instructions hereafter to be issued."

This was followed, on August 22, 1898, by one of the orders of instructions thus contemplated as part of the system inaugurated by the proclamation. That order provided, among other things, that the local courts continued by the proclamation should not exercise jurisdiction over crimes committed by or against any person belonging to or connected with the Army of the United States, but that such crimes should be tried by court-martial, military commission, or provost court.



It is clear that it was not then intended to confer upon local tribunals jurisdiction over offenses committed by officers and soldiers of the Army. Nor can we find such an intent in subsequent orders of the military government issued during the insurrectionary period. To do so would be to find one at variance with the actual practice of trying soldiers for all manner of civil crimes exclusively by courts-martial under articles 58, 62, etc., of the Articles of War.

Whilst it is true that the jurisdiction of military tribunals is not exclusive *in time of peace* and in territory where the supremacy of the United States is recognized and the relations between the local government and the National Government normal, and where also the exercise of jurisdiction of the local civil courts is not disturbed, it is equally true that when the armies of the United States are in hostile territory, and, as in the present case, engaged in actual warfare, the jurisdiction of such tribunals over such offenses *is* exclusive; and it is evident from the decisions cited that in reference to the present question the country was none the less "enemy's country" and the territory hostile, because it was harassed by insurrection against a sovereignty perfect in law, rather than attacked or defended by a recognized belligerent.

As the alleged act of Captain Brownell was committed while he was an officer in the army of the United States operating in "enemy's country," it is my opinion that he was amenable only to the laws of war, supremacy of which, to use the language of Justice Field in the Dow case, "for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home and, in time of peace, is essential to the preservation of liberty."

Respectfully,

P. C. KNOX.

The SECRETARY OF WAR.

## DRAWBACK—COTTON BALES—BURLAPS.

Imported burlaps, on which duty has been paid, when used as coverings on the so-called "round lap" bales of cotton, are not, when re-exported, entitled to drawback under section 30 of the tariff act of July 24, 1897 (30 Stat., 211), for the reason that the bale is not an article manufactured or produced within the meaning of that section. It is merely a package of material peculiarly constructed which may be resolved into covering and contents.

## DEPARTMENT OF JUSTICE,

*February 3, 1903.*

SIR: Your letters of June 5 and 19, 1902, submit to me the question whether drawback may be allowed on imported burlaps used as coverings for the so-called "round-lap bale." This bale is made up of domestic raw cotton, with a cover of imported duty-paid burlap; and is put together by the automatic action of special machinery in one continuous operation which cleanses the cotton, forms it into a sheet or "bat," winds and compresses it into a cylindrical shape, and covers it lengthwise with burlap which is lapped and fastened. Finally the burlap ends of the bale are cut and both ends and side sewed up by hand.

It seems that cotton thus carefully prepared and baled for shipment has many commercial advantages over cotton in ordinary bales, and the claim is made that, being the result of one continuous and elaborate process of manufacture, the finished round-lap bale is a distinct commercial product, a complete and separate article, entitled to drawback of the duties paid on the burlaps under section 30 of the tariff act of 1897, which provides:

"That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties."

The question, then, is whether the bale in its entirety is an article manufactured or produced within the intent of this law. The claimants do not argue that the burlap part of the bale—that is, the covering itself—is such a manufactured article. Indeed, the consistent and long-continued

rulings of your Department render that view untenable in reference to balings as well as other coverings. The Treasury Department has held in many decisions that the baling of merchandise, the cutting of the imported cloth, and fastening the same around the bales does not constitute a manufacture within the contemplation of the law (e. g., T. D., 19861). That rule has also been laid down by the courts. It was held in *Wheeler v. United States* (75 Fed. Rep., 654) that the law "relates to materials from which articles of exportation are manufactured or produced, and not to their coverings or packages."

May the entire bale, then, be regarded as a manufactured article? I think not. The definition of "manufacture" in *Erhardt v. Hahn* (55 Fed. Rep., 273, 275) states a view which is well established, viz:

"Where an article has been advanced through one or more processes into a completed commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material, and is put into a completed shape designed and adapted for a particular use, it is deemed to be a manufacture."

Whatever the advantages in this better method of baling, or the accompanying improvement in the condition of the raw cotton, it is still raw cotton, destined for shipment to mills here and abroad as the mere material of manufacture. Neither the cotton, nor the cover, nor the bale as an integral thing, can justly be regarded as a manufactured article in the sense of the statute. In no real sense has the domestic material been combined with the imported material into a distinctive and completed shape. It is on the way to be wrought into manufactured articles, and by means of this bale is particularly well packed for shipment; that is all. It is a package of material peculiarly constructed; it is not an article manufactured or produced.

However earnestly it may be asserted that the bale is an integral thing, it is inevitable that the mind should resolve it into covering and contents. In a case as to bottled beer it was claimed on the same theory that "bottled beer" was a complete and distinct manufactured article. (*Brewing Co. v. United States*, 181 U. S., 584.) In denying drawback in

respect of the bottles, the court speaks of them as “ simply the *packages* which the manufacturer, for the purposes of export, sees fit, and perhaps is required, to make use of for the proper preservation of his product.”

It is urged that a liberal construction ought to be adopted. Upon this point I quote from the decision in the *Brewing Company* case (*ante*), p. 589:

“ Yet this apparent hardship will not authorize us to do violence to the clear language of the statute. If the law afford him [the manufacturer] an imperfect relief, his remedy is by application to Congress for additional legislation, and not to the judicial power for a strained interpretation of the law already in force.”

I must therefore answer your inquiry in the negative.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

---

SEIZURE AND DESTRUCTION OF FUR-SEAL SKINS UNLAWFULLY IMPORTED.

While collectors of customs and other revenue officers, under the direction of the Secretary of the Treasury, are the proper officers to seize and destroy fur-seal skins imported into the United States in violation of section 9 of the act of December 29, 1897 (30 Stat., 226), yet the usual proceedings for condemnation and forfeiture should be instituted in order to determine whether or not the seizure of such skins was justifiable and their destruction a necessary consequence.

The authority of such officers to seize and destroy by summary action rather than under judicial proceedings is reached by implication, as the statute is not explicit upon that point. Where rights of person and property are involved, an implied authority which is summary and might be used arbitrarily should not be lightly assumed. In such cases the inference should not only be persuasive but irresistible.

DEPARTMENT OF JUSTICE,

*February 4, 1903.*

SIR: Your letter of December 13, 1902, presents for my opinion the question whether collectors of customs, or other revenue officers, are authorized to destroy fur-seal skins under section 9 of the act of December 29, 1897 (30 Stat., 226), without a decree of forfeiture being first obtained.

That section provides that "the importation into the United States by any person whatsoever of fur-seal skins taken in the waters mentioned in this act, \* \* \* is hereby prohibited, and all such articles imported after this act shall take effect shall not be permitted to be exported, but shall be seized and destroyed by the proper officers of the United States." It is obvious that the word "importation" is used in this particular law in its general meaning, and does not imply or require arrival from a foreign country. Undoubtedly the prohibition is intended to be rigorous and absolute in support of the policy of the Government for the protection of fur seals, and the inference that the seizure and destruction shall be by summary executive action rather than under judicial proceedings is manifestly strong. Nevertheless, the statute is not explicit upon the point, and the view indicated is reached by implication. As rights of person and property are involved, an implied authority which is summary and might be arbitrary is not to be lightly assumed. The inferences should not only be persuasive but irresistible.

It is a fundamental proposition of law that every person charged with an offense or a liability shall have his day in court; that no man shall be deprived of his property without due process of law. While executive determination of rights of property and person has been sustained as due process of law when it was the express and manifest intention of Congress to confer such authority upon administrative officers, it may be safely presumed that without such clear intent judicial proceedings are necessary for the determination of these rights.

It is evident on the face of section 9 of the act cited that an important question of fact, properly calling for judicial determination, always exists in such cases, namely, whether the particular fur-seal skins were taken in the waters mentioned. Again, to import such fur-seal skins is a violation of the act, and section 5 confers jurisdiction upon certain courts for the prosecution of *any* violation of the act or of the regulations thereunder. Sections 6 and 7 of the act suggest, relative to an Indian right of fishing under a prior law, and to the special laws relating to the taking of fur

seals upon the Pribilof Islands, that there may be exceptions to the prohibition of section 9, and that particular fur-seal skins may be within the protection of such exceptions. I do not intimate any view of my own upon these related questions; I merely point out that important questions of fact and law are involved in such cases, and that these questions are very proper to be determined by the courts who have jurisdiction in general over the subject.

It seems to me that collectors of customs and other revenue officers, under your direction, are the proper officers to seize and destroy; but, on the whole, I am of the opinion that the usual proceedings for condemnation and forfeiture should be instituted in order to determine whether or not the seizure was justifiable and destruction a necessary consequence.

I have instructed the United States attorney in accordance with this opinion upon the particular case which you submit.

Very respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

---

CERTIFICATE OF MERIT—ENLISTED MEN OF MARINE CORPS.

Section 1216, Revised Statutes, as amended (act of March 29, 1892; 27 Stat., 12), which empowers the President to grant a certificate of merit to an enlisted man of the Army who has distinguished himself in the service and has been recommended therefor by the commanding officer of the regiment or the chief of the corps to which such man belongs, applies only to enlisted men of the Army, and not to members of the U. S. Marine Corps who have been similarly commended.

DEPARTMENT OF JUSTICE,

*February 5, 1903.*

SIR: I have the honor to respond to your communication of January 21, in which you state the case of Sergt. Patrick J. Sullivan, U. S. Marine Corps, who was commended by your predecessor for conspicuous and meritorious conduct in the battle near Tientsin, China, June 21, 1900. You ask my opinion on the question whether section 1216 of the Revised Statutes, as amended, is applicable to the Marine Corps.

Section 1216 in its present form (acts of February 9, 1891; 26 Stat., 737; and of March 29, 1892; 27 Stat., 12) provides that when any enlisted man of the Army shall have distinguished himself in the service, the President may, at the recommendation of the commanding officer of the regiment or the chief of the corps to which such enlisted man belongs, grant him a certificate of merit. This is an explicit provision for enlisted men of the Army, not of the Navy or of the Marine Corps. It seems to me to be exclusive, for there is corresponding provision for the Navy, which, in its original form (sec. 1407, Rev. Stat.), conferred upon seamen a gratuity and medal of honor for distinguished and heroic service. By the act of March 3, 1901 (31 Stat., 1099), this reward was expressly extended to any enlisted man of the Navy or *Marine Corps* who shall have distinguished himself in battle or displayed extraordinary heroism in the line of his profession.

In view of this clear distinction created by the terms of the law between the enlisted men of the Army and of the Navy and the Marine Corps, respectively, in regard to extraordinary reward for distinguished service, it does not seem to me that section 1612, Revised Statutes, assimilating the Marine Corps to the Army in respect to ordinary pay, allowances, and bounty for reenlisting, is applicable to the special reward for gallant service so as to bring the Marine Corps within section 1216. In consequence of these views, I have the honor to answer your inquiry in the negative.

Very respectfully,

P. C. KNOX.

The SECRETARY OF THE NAVY.

---

MEDAL OF HONOR—OFFICER—PRIVATE—MILITARY  
SERVICE.

Under section 6 of the act of March 3, 1863 (12 Stat., 751), the President may present a medal of honor to an officer or private in the military service of the United States who has distinguished himself in action, notwithstanding he is not in the military service at the time the case reaches the President for consideration, provided the application or recommendation therefor was made while he was in the military service.

A medal of honor can not be awarded where the application or recommendation therefor is made after the officer or private has been discharged from the military service.

DEPARTMENT OF JUSTICE,

*February 6, 1903.*

SIR: By your reference dated January 3, you submit for my opinion the following questions propounded by the president of the medal of honor and certificate of merit board relative to cases pending before that board:

"1. When an officer, non-commissioned officer, or private in the military service of the United States has most distinguished or may hereafter most distinguish himself in action, can the President present to such person a medal of honor under section 6 of the act of Congress approved March 3, 1863 (12 Stat., 751), notwithstanding the fact that he is not in the military service at the time the case reaches the President for consideration, provided the application or recommendation therefor was made while he was in the military service?

"2. Can a medal of honor be awarded when the application or recommendation therefor is made after the officer, non-commissioned officer, or private has been discharged from the military service; and if so, what, if any, limit of time will bar the award of a medal in such a case?"

The law cited is as follows:

"That the President cause to be struck from the dies recently prepared at the United States mint for that purpose, 'medals of honor' additional to those authorized by the act [resolution] of July twelfth, eighteen hundred and sixty-two, and present the same to such officers, non-commissioned officers, and privates as have most distinguished or who may hereafter most distinguish themselves in action; and the sum of twenty thousand dollars is hereby appropriated out of any money in the Treasury not otherwise appropriated to defray the expenses of the same."

In an opinion of the Judge-Advocate-General dated September 2, 1891, it is suggested that this act is no longer in effect. It may, indeed, be forcibly argued that the language of the act shows a temporary and special purpose



appropriate to the immediate events of that time, and that the law was probably intended, although without restrictive words, to apply only to the particular President, officers, men, and actions then contemplated by Congress. The officers and men were those then in service who had distinguished themselves or who might distinguish themselves in actions taking place from day to day in the civil war. The act or resolution of 1862, mentioned in the act of 1863, uses the phrase "during the present insurrection," which may qualify the word "hereafter" in the later act. The act of 1863 was not carried into the Revised Statutes. The reasons are apparent for the suggestion that its scope was thus limited and that it is now obsolete.

I do not, however, undertake to decide this point, which I am not strictly called upon to do under your present application. I should, indeed, hesitate to hold that the act is not in force against the uninterrupted practice of your Department. But the doubt regarding it falls in with the opinion of my predecessor (20 Opin., 421) regarding the necessity of prompt application for a medal of honor, so as to convince me that your questions must be answered as indicated by the reasoning and principles invoked in my opinion of September 23 [ante, p. 127], 1902, regarding the somewhat similar "certificate of merit" law. In that case, it is true, unlike the present, the practice of your Department, with substantial uniformity, confirmed the application of the principles indicated. Yet, on consideration of the whole subject, I have no hesitation in reaching the conclusion that your first question must be answered in the affirmative, and the first portion of your second question in the negative, which renders it unnecessary to answer the final portion of that question. I have the honor to advise you accordingly, and remain,

Very respectfully,

P. C. KNOX.

The SECRETARY OF WAR.

SECRETARY OF THE TREASURY—SMUGGLING—SEIZURE  
AND FORFEITURE—REMISSION OF PENALTIES.

When property subject to forfeiture for smuggling or cognate offenses is seized, the appraisement should be in accordance with section 3074, Revised Statutes, and not under section 13 of the Customs Administrative act (26 Stat., 136).

Smuggling is the actual passage of dutiable goods through the lines of the customs house without paying or securing the payment of the duties thereon.

The purpose of the law as to smuggled or unentered goods, requires the exaction of the so-called "home value" as the condition of release on payment of the appraised value, but not as implying the assessment of duties on such goods.

Smuggled goods are to be associated with prohibited goods and are not liable to duty. The Government should, therefore, limit its action to forfeiture of the goods and prosecution of the offender.

Where, upon the seizure of smuggled or unentered goods, the Secretary of the Treasury, in the exercise of his power to remit fines and penalties, accepts in lieu of forfeiture the payment of such an amount as he deems just and equitable, the amount paid should be treated as a fine imposed rather than as a duty collected.

The power of the Secretary of the Treasury to release and remit fines, penalties, and forfeitures under sections 3081 and 5293, Revised Statutes, and under sections 17 and 18 of the act of June 22, 1874 (18 Stat., 189), now subject to the restriction of section 7 of the Customs Administrative act as amended (30 Stat., 212), relates only to civil liability and consequences where the value of the property seized or the amount of the fine or forfeiture incurred does not exceed \$1,000; but does not include penalties "accrued" or "incurred" which have been "adjudged" as part of the punishment under an "indictment."

DEPARTMENT OF JUSTICE,

*February 17, 1903.*

SIR: In your letter of January 22, you refer again to the question of collecting duties on goods imported and entered under a fraudulent invoice, which have been subsequently seized and forfeited, and on goods the importation of which is specifically prohibited, citing my opinions of March 12, 1902 [ante, p. 1], and January 6, 1903 [ante, p. 556], upon this subject. You remain in doubt whether duties should be collected, notwithstanding subsequent seizure and forfeiture, on smuggled goods or unentered goods which, in violation of the revenue laws, have in any way surreptitiously escaped the customs officers.

In connection with this subject, and in relation to sections of the Revised Statutes (secs. 3074, 3081), which, under certain limitations as to value, direct appraisement of merchandise seized for violation of the revenue laws, and authorize release upon payment of the appraised value, you cite 23 Opin., 377, holding that when appraisement relates to dutiable value under section 7 of the Customs Administrative act respecting undervaluation, section 13 of that act and not section 3074, Revised Statutes, prescribes the method of appraisement, although seizure and forfeiture may result from the undervaluation. Thereupon you request my opinion on the following questions:

1. Does section 13 of the Customs Administrative act provide the proper remedy for the appraisement of smuggled or unentered goods seized for violation of the customs revenue laws? If so, is the Treasury Department, in releasing such goods on payment of the appraised value under section 3081, Revised Statutes, required to exact the home value, namely, the foreign value with the duty added, or is the term "appraised value" therein used to be understood as meaning the foreign value alone?

2. Are not smuggled goods, other than those specifically and absolutely prohibited, in principle ideally prohibited goods; and if such, should or should not the Government limit its action to the forfeiture of the goods and the prosecution of the offender?

3. If duties or their equivalent are to be exacted on smuggled or unentered goods seized for violation of law, should such collections be treated as fines or duties?

As to the first question: It is necessary to determine what your words "smuggled or unentered goods" intend to embrace. It is evident from various references in your letter that by *unentered goods* you indicate violations of the revenue laws which are akin to smuggling, which rest under a certain presumption of willfulness of act or default, as seeking the clandestine entrance of merchandise without paying duty. Smuggling is the actual passage of dutiable goods through the lines of the custom-house without paying or securing the duties. Provision against the end, smuggling, is made by the enactment of numerous distinct and separate

offenses against the means of accomplishing it. (*Keck v. United States*, 172 U. S., 434.) It is such acts, preparatory or akin to smuggling or consequent thereon, showing the intention or attempt to smuggle, which you appear to have in mind when you associate unentered goods with smuggled goods. The unentered goods referred to are those which are withheld from entry, which are concealed, with fraudulent and criminal intent in order to avoid the payment of duty. In my opinion, then, when property subject to forfeiture for smuggling or cognate offenses is seized, the appraisement should be in accordance with section 3074 of the Revised Statutes, because the purpose of the inquiry is not to ascertain dutiable value, to which section 13 of the Customs Administrative act relates, but to reach summary condemnation and sale, if no claim is made nor bond given, or, it may be, remission of forfeiture and release on payment of the appraised value (secs. 3075-3081).

You proceed to ask me whether, in releasing smuggled or unentered goods under section 3081, you are required to exact the "home value," that is, the foreign value with the duty added, or may accept the foreign value alone. The home value, so reached, is a preliminary and fairly accurate standard or index of the value to the Government on a condemnation sale, which is the result contemplated in sections 3074 *et seq.* The Government is entitled to receive the avails of the property as measured in its own markets, either on sale or by release upon payment of value. The process of computation, that is, of appraisement, looks to this end. *Quoad hoc*, the process has no necessary relation to dutiable value, and is therefore distinguished from the appraisement of the Customs Administrative act, which, in its restriction of the word "value" (sec. 19), whenever used in that act "or in any law relating to the appraisement of imported merchandise," to the wholesale price abroad, clearly refers only to the *ad valorem* dutiability of lawfully imported merchandise, or of merchandise imported "under color of conformity to the law and regulations of the customs." An offense akin to smuggling, in effect and result (*United States v. 67 Packages*, 17 How., 85), occurs under section 9 of that act when an entry is made by means of a false invoice or

any fraudulent practice. Yet, in accordance with my previous views which you cite, duties being due notwithstanding the liability to forfeiture and criminal penalties, because the transaction has proceeded under color of law and entry has been made, appraisement for dutiable value under sections 13 and 19 is probably called for there as in the case of goods seized for undervaluation. I am not required to decide this last point by your reference, but the suggestion serves to enforce the distinctions which I am indicating.

As to smuggled and unentered goods, therefore, which may be released, I am of opinion that the purpose of the law requires the exaction of the so-called home value as the condition of release on payment of the appraised value, but not as implying the assessment of duties on such goods.

As to your second question, the foregoing discussion foreshadows the reply which, in my judgment, should be made. Smuggled goods are in a very real sense prohibited goods. The prohibition, it is true, relates to the evasive and dishonest manner of their introduction and not to their character, as in the case of goods the importation of which is specifically and absolutely prohibited on grounds of policy or morals. It is not necessary to dwell on the technical meaning of the word "importation," which is satisfied by arrival within the limits of a port of entry with intent to unlade. The ultimate purpose of all such prohibitions of importation is to prevent the actual introduction of the goods into the country, and the offense of smuggling is not complete, as we have seen, until the merchandise has been landed; that is, has actually crossed the line of the customs authorities. This clandestine introduction is prohibited by the gravest penal sanctions (secs. 2865, 3082, R. S.). I shall not delay to consider the doubts indicated by the courts as to the scope and meaning of the importation "contrary to law" denounced by section 3082. It may include the substantive crime of smuggling punished *eo nomine* by section 2865, or refer rather to importations in a certain forbidden form or condition or to importations specifically and absolutely prohibited. (*United States v. A Lot of Jewelry*, 59 Fed. Rep., 684; *United States v. Thomas*, 4 Ben., 370; 28 Fed. Cas., 76.) It is probable that under an indictment

properly laid the two sections proceed *pari passu* and supplement each other. Together they provide for the forfeiture of goods and the punishment of the offender by fine or imprisonment, or both. These are the weightiest criminal sanctions respecting a crime historically of high grade as affecting the integrity and effectiveness of Government revenue systems. The idea of punishment dominates the subject, and the idea of liability to duty is not admissible. There is not the civil obligation of debt due the Government, but criminal responsibility for a deliberate and willful offense toward which Government must be peculiarly stern.

A definition of smuggling cited in the *Keck case* (*ante*) is as follows (p. 446):

"It consists in bringing on shore or carrying from the shore, goods, etc., for which the duty has not been paid, or goods of which the importation or exportation has been prohibited."

Careful examination of the reported English and American decisions in prosecutions for smuggling or informations for forfeiture of smuggled goods fails to disclose any reference to the idea that duties should be collected on smuggled goods in addition to the criminal remedy of imprisonment and the civil remedy of forfeiture.

Smuggled goods are, then, to be associated with prohibited goods and, under the principle stated by Mr. Justice Story in *M'Lane v. United States* (6 Pet., 423), are not liable to duty. The Government should limit its action to forfeiture of the goods and prosecution of the offender.

As to your third question, the answer to your second question strictly eliminates any further reply. But while I have determined that duties are not to be exacted on smuggled goods or unentered goods as above defined, but forfeiture and other specific penalties are to be enforced, it must be remembered that the Secretary of the Treasury has the power of release and of remission of fines, penalties, and forfeitures in certain cases by section 3081, Revised Statutes, to which we have referred, and by section 5293 and sections 17 and 18 of the act of June 22, 1874, subject now to the restriction of section 7 of the Customs Administrative act as amended. This power is to be exercised under the Secre-

tary's sound discretion, and seems to include fines and forfeitures in smuggling cases in which the value of the property seized or the amount of the fine or forfeiture incurred does not exceed \$1,000 (sec. 5293), or where the value involved exceeds \$1,000 and there has been a summary inquiry and statement of facts by a judge, as provided in sections 17 and 18 of the act of 1874; subject to the qualification that if the penalty has not only "accrued" or been "incurred," but has also been "adjudged" as part of the punishment for a crime under an indictment carried to trial and verdict, the Secretary's authority to remit does not extend so far. Otherwise it would interfere with the pardoning power of the President. The Secretary's authority relates to civil liabilities and consequences; the pardoning power to punishment for criminal offenses against the United States. But, subject to this limitation, since the Secretary may absolutely remit, he may remit and release on terms, as by the payment of such amount as he may determine to be just and equitable. In such case the amount paid should be treated as a fine imposed rather than as a duty collected.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

---

SECRETARY OF THE TREASURY—POWER TO RELEASE  
GOODS SUBJECT TO FORFEITURE.

The Secretary of the Treasury may release cigars imported in violation of section 26 of the act of August 27, 1894 (28 Stat., 552), amending section 2804, Revised Statutes, on payment of a fine equal to the duty, when in his opinion the importation does not involve fraud.

DEPARTMENT OF JUSTICE,  
*February 17, 1903.*

SIR: Your letter of January 24, referring further to the collection of duty on prohibited goods, asks me whether the Treasury Department may release cigars imported in violation of section 26 of the act of August 27, 1894, amending section 2804, Revised Statutes, on payment of a fine equal to the duty, when in the opinion of the Secretary the im-

portation does not involve fraud. The law cited forbids the importation of cigars unless each box contains not more than 500, and each invoiced package not less than 3,000. The purpose plainly is to discourage and prevent clandestine introduction—that is, smuggling, which larger boxes or smaller packages would in different ways and for different reasons facilitate. The object is to impose a penalty effective to stop an undesirable practice. There is no other purpose of morals, hygiene or special policy which, for instance, in such cases as literature or articles of an immoral nature, neat cattle which may introduce disease, and seal skins taken in certain waters, demands either that the forbidden things shall not enter the country at all—that is, if technically imported, that they shall not be admitted to entry and shall be reexported, or that they shall be destroyed. In the case of immoral articles, the law (sections 16–18 of the tariff act of July 24, 1897) provides for forfeiture proceedings by due course of law, to the end that the articles may be regularly condemned and then destroyed. In the case of cigars not legally packed, there is a certain implication in the law that they shall be absolutely excluded from this country. There is no provision for condemnation proceedings, and no explicit direction to the Secretary of the Treasury either to seize and proceed to forfeit, or to destroy. On the other hand, there is no provision to return to the country of origin or exportation; and, since the offense is patent from inspection of the boxes and packages after entry (which is usually made), and there is no necessity for judicial proof of facts or intent, and since there is no cogent reason in policy calling for destruction or return, but merely the design to prevent a method of packing improper in form and possibly pernicious in results, it might be argued that the law fairly construed intends to confer upon the Secretary the authority to seize and forfeit in a summary way by executive act, proceeding to sell, or, if he sees fit, to exercise his power of remission.

But, on the whole, it is my opinion that while the right to seize is clear, the Secretary's proper course thereupon will be to proceed under sections 3074–3079, Revised Statutes, in instances to which those sections are applicable, or by



regular proceedings to condemn and sell in other instances. The power of release or remission, to be exercised under a sound discretion, would then supervene, where the value of the property appraised or the amount of the forfeiture accrued or incurred does not exceed \$1,000 under sections 3081 and 5293, or under sections 17 and 18 of the Anti-Moiety act of 1874 (21 Opin., 101; *id.*, 283), when the value exceeds that sum.

As I said to you in another opinion delivered to you this day upon a related subject [*ante*, p. 588]:

“Since the Secretary may absolutely remit, he may remit and release on terms, as by the payment of such amount as he may determine to be just and equitable. In such case the amount paid should be treated as a fine imposed.” \* \* \*

I may add that I see no reason why you may not, if you deem it right, measure the fine by the amount of duty on a regular importation of the same character and value, and impose an equivalent amount by way of fine or penalty, or rather in settlement of the greater penalty of a total forfeiture.

I therefore have the honor to answer your question in the affirmative.

Very respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

#### HEAD TAX—ALIEN PASSENGERS—TRANS-SHIPMENT.

The mere transfer from one vessel to another in a port of the United States, of alien passengers en route to their destination in a foreign country, does not subject such persons to the payment of the “head tax” or duty prescribed by section 1 of the act of August 3, 1882 (22 Stat., 214), as amended by the act of August 18, 1894 (28 Stat., 391). Opinions of May 22, 1885 (18 Opin., 185), and June 15, 1897 (21 Opin., 543), concurred in.

DEPARTMENT OF JUSTICE,

*February 28, 1903.*

SIR: I have the honor to respond to your note of February 12, 1903, in which, with its inclosures, you request my official opinion upon several questions there stated.

In reply, I have to state that some of the questions there submitted do not appear to be questions arising upon an actual case pending in your Department, and for that reason are not specifically answered here.

The principal question is whether the head tax prescribed by section 1 of the act of August 3, 1882 (22 Stat., 214), as amended by the act of August 18, 1894 (28 Stat., 391), is properly collectible on account of three Chinese passengers who arrived in the port of San Francisco July 5, 1902, under the following circumstances:

These persons took passage at Hongkong upon one of the steamships of the Occidental and Oriental Steamship Company, for Jamaica, West India Islands. The usual way for completing such voyage is to trans-ship in the port of San Francisco to a vessel bound for Panama, and there to a vessel bound for Jamaica, and this is what was contemplated in the case of these persons. Upon arrival in the harbor of San Francisco, without landing or going ashore, these passengers were transferred from the vessel in which they arrived to one bound for Panama and went their way to their destination. The transfer was en route and in the prosecution of their original voyage, and their entry into a port of the United States merely for the purpose of transfer was thus an unavoidable incident of their voyage through to their actual and ultimate destination.

Section 1 of the act of August 3, 1882, provides:

“That there shall be levied, collected, and paid a duty of fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from any foreign port to any port within the United States.”

By the act of August 18, 1894, this duty was increased from 50 cents to \$1 *per capita*.

Either this section must be taken literally and just as it reads or it may require construction dependent upon extrinsic facts. In the first case, all that is necessary in order that the prescribed duty be collectible is that the passenger be an alien, and come by steam or sail vessel from a foreign port into a port within the United States, quite independent of other considerations as, for example, whether such be the

port of his destination or merely a place where the vessel touches *en route* to the real destination; or whether he lands at such first port; or whether he there trans-ships to another vessel or continues his voyage in the same vessel, so long as he thus comes "to a port within the United States." In the other case construction may be resorted to in order to determine whether, in view of all the facts and circumstances which may and often do exist, Congress intended such literal application of the section, and meant that the duty should be collected and paid in every instance of such entry into a home port, however transitory, or for whatever purpose, and even in case of distress.

Whether the one or the other of these ways of reading this law might be considered correct, were the question one of first instance, this Department has heretofore adopted the latter view, and I am not disposed to question its correctness. (See 18 Opin., 135, and 185; and 21 Opin., 543.) Neither of these proceeded upon the idea that this section requires a literal reading or application, but, in each, resort was had to construction by the aid of attendant extrinsic facts, in order to determine the true meaning and application of the section. And in 21 Opin., 543, the meaning thus determined is quite different from the literal reading of the act. I am not disposed to depart from this ruling of my predecessors, that the act does not require the payment of this duty upon every such entry, however casual or temporary, into a port within the United States, nor to disaffirm the doctrine of the case last referred to. In that case, following some intimations of the Supreme Court, it was held that the capitation tax was imposed only upon alien passengers whose destination was this country, and not upon those who casually come into our ports, *en route* to some other destination. As said by the Supreme Court in *Henderson v. The Mayor of New York* (92 U. S., 274), a case involving a somewhat similar tax, this duty is "in effect, a tax on the passenger, which he pays for the right to make the voyage—a voyage only completed when he lands on the American shore." This means, of course, that he pays the tax for the right to make the whole voyage; and the voyage

is not completed, nor the tax payable until he has reached the destination of that voyage; and if that be some country beyond this, the duty does not become payable upon his entry into one of our ports *en route* to that destination.

This doctrine, and that of the case referred to in 21 Opin., *supra*, is quite conclusive of the case here considered. Indeed, the latter case is the same as this in principle.

Nor is there, as is suggested, any conflict or discrepancy in that case and the one referred to in 18 Opin., 185. In 21 Opin., 543, it was held that in the case of certain Japanese, sailing from Yokohama bound for Mexico, who came into the harbor of San Francisco and were there trans-shipped to a vessel bound for a Mexican port, this capitation tax was not collectible. This was because their destination was not reached nor their voyage completed. In the case in 18 Opin., 185, certain alien tourists landed in New York for a temporary sojourn in this country, and the tax was held to be payable. This was because they had reached their destination—the United States—and their voyage was completed. The cases are entirely consistent, and their doctrine is that, when the destination of an alien passenger from a foreign port is this country, and he has reached the port of that destination, the tax is payable, no matter what may be his intention as to the length or purpose of his stay here. But when the destination of such alien passenger is some country beyond this, and he enters a port of the United States *en route* and as part of the voyage or journey to his destination, the tax is not payable on his account. And with this I concur.

Specifically, I have to advise you that in the case of the three Chinese passengers referred to in your note and its inclosures, bound for Jamaica and trans-shipped in the harbor of San Francisco, *en route* to their destination, the tax or duty prescribed by section 1 of the act of August 3, 1882, is not payable.

Respectfully,

P. C. KNOX,

THE SECRETARY OF THE TREASURY.

19219—03—38

CONSTRUCTION OF STATUTES—RIVER AND HARBOR  
IMPROVEMENT—SECRETARY OF WAR.

The words "*is authorized*" contained in that provision of the River and Harbor act of June 13, 1902 (32 Stat., 342), which confers upon the Secretary of War the power to purchase or build a dredge for use in harbor improvement and maintenance in Lake Erie, while equivalent to the word "*may*," are used in a mandatory sense and are binding upon the executive, whose duty it is to carry them into effect.

While "*may*" in any statute is ordinarily to be construed as "*shall*" or "*must*" when public rights or interests are concerned, yet the construction depends upon the context of the statute, the test being the intent of the legislature.

DEPARTMENT OF JUSTICE,  
*February 28, 1903.*

SIR: I have the honor to respond to your letter of February 6, in which you cite the provision in the act of June 13, 1902 (32 Stat., 342), which authorizes the Secretary of War to purchase or build a dredge for use in harbor improvement and maintenance upon Lake Erie; and, calling attention to similar provisions in the same statute for the construction of dredges in connection with works of river and harbor improvement in Lake Michigan, you ask my opinion on the question whether the requirements of the law in question in respect to the work of dredge construction provided for are mandatory in character, or whether they are wholly or in part directory.

It is fundamental that the work of river and harbor improvement, and undertakings tributary thereto like the dredge construction now presented, are incidents of the national power to regulate navigation and commerce. The authority and initiative of Congress is complete and exclusive. An illustration of the exercise of this jurisdiction by Congress directing and restricting the executive, is shown by the fourteenth section of the act before us (32 Stat., 376), in which the Secretary of War is directed to cause preliminary examinations or surveys to be made respecting harbor improvement, and which requires such preliminary examination unless a survey or estimate is expressly directed; and provides that, in case after preliminary examination the particular improvement is not deemed

advisable, no survey or estimate therefor shall be made without the direction of Congress, etc. (Cf. sec. 2, act of March 3, 1899; 30 Stat., 1149.)

In other words, in a particular and peculiar sense the will of Congress operates upon the executive in a mandatory way in the laws technically known as river and harbor bills. In general, it is the duty of the executive to carry such legislative mandates into effect whatever the executive opinion may be as to their expediency or propriety, those considerations having been determined when Executive approval to the law has been given.

Taking up, now, the particular point of interpretation, the clause to be considered is, "The Secretary of War *is authorized to* cause to be purchased or built," etc. The words italicised, like corresponding expressions in statutes, are equivalent to the word "may," and the question is, Are these words used in a mandatory or permissive sense?

The ordinary meaning of "may" is generally permissive, but as used in law it is often mandatory and equivalent to "shall" or "must." The rule has been stated as follows:

"It is well settled that 'may,' in any statute, is to be construed as equivalent to 'shall' or 'must' when the public interests or rights are concerned, and when the public or third persons have a right *de jure* to claim that the power granted should be exercised. \* \* \* A duty is impliedly imposed to exercise it [the power] whenever the occasion arises. These terms are, then, in effect, invariably invested with a compulsory force," etc. (Black, Interpretation of Laws, p. 156.)

"But it would be difficult to believe that Parliament would ever have intended to commit powers to public persons for public purposes for exercise or non-exercise in any such spirit;" that is, as convenience or interest might dictate when a mere privilege or license is conferred upon private individuals. "\* \* \* But as regards the imperative character of the duty, it was laid down by the King's Bench that words of permission in an act of Parliament, when tending to promote the general benefit, are always held to be compulsory." (Endlich on Interpretation of Statutes, pp.

422, 423. See also *Supervisors v. United States*, 4 Wall., 435, and cases cited; Sedgwick on Construction, pp. 375, 377.)

The application of this rule, however, depends upon the context of the statute; the test is the intent of the legislature (*United States v. Thoman*, 156 U. S., 353). As to this element of interpretation, it is proper to observe that the act under consideration authorizes the construction of many separate works of improvement, involving large expenditures, and in every case the provision is that the Secretary of War *may* (in effect) undertake the particular improvements authorized. If the use of the word "may" in such enactments is permissive merely, and its force and scope extend no further than to authorize the construction of these works in the discretion of the Secretary of War, then by failure or neglect to avail of the authority conferred on him, or by adverse exercise of the discretion intrusted to him, he would defeat the exercise of legislative power in a matter committed to the exclusive jurisdiction of Congress and, manifestly, upon consideration of the whole subject and the entire river and harbor programme, intended to be carried into effect promptly and exactly.

It seems to me, then, that, considering the words "is authorized," etc., in the above provision as equivalent to the word "may," that word must be construed to have the meaning of "shall," and is not to be taken to import mere permission, or to grant an alternative or choice as if its meaning were "may or may not." I conclude, therefore, that the clause of the act of June 13, 1902, above cited, is mandatory in character, and as such is binding upon the executive whose duty it is to carry the mandate into effect.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF WAR.

TONNAGE TAX ON FOREIGN CABLE SHIP.

A British cable construction steamship engaged in its legitimate business, arriving at Honolulu from a foreign port, is not a vessel engaged in trade within the meaning of section 11 of the act of June 19, 1886 (24 Stat., 79), and therefore is not subject to the tonnage tax provided for in that section.

DEPARTMENT OF JUSTICE,

*March 10, 1903.*

SIR: I have the honor to acknowledge the receipt of your letter of December 4 last, transmitting copy of a letter from the collector of customs at Honolulu and of its inclosures, "consisting of a protest by Messrs. Theo. H. Davies & Co. against the collector's assessment of tonnage tax on the British cable-construction steamship *Britannia*, which arrived at Honolulu from Fiji and was entered at the custom-house accordingly."

It appears that this tax was levied under the provisions of section 11 of the act of June 19, 1886 (24 Stat., 81), amending section 14 of "An act to remove certain burdens on the American merchant marine and *encourage the American foreign carrying trade* and for other purposes," approved June 26, 1884. (23 Stat., 57.)

Said section 11 provides: "That in lieu of the tax on tonnage of thirty cents per ton per annum imposed prior to July first, eighteen hundred and eighty-four, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or the Sandwich Islands, or Newfoundland; and a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports, *not, however, to include vessels in distress or not engaged in trade.*"

Said section provides further that the President shall suspend the collection of so much of such duty on vessels



entered from any foreign port as may be in excess of the tonnage and light-house dues, or other tax or taxes imposed in said port on American vessels by the government of the foreign country in which such port is situated, and shall by proclamation indicate the ports to which such suspension shall apply, and further that such proclamation shall exclude from the benefits of such suspension vessels of any foreign country in whose ports the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues, or duties imposed on the vessels of such country, or on the cargoes of such vessels.

The question here to be determined is whether the *Britannia*, at the time this tax was imposed, was engaged in trade within the meaning of said section 11.

One of the purposes of the original act of 1884, previously referred to, as disclosed by its title, is to "*encourage the American foreign carrying trade.*" Unquestionably this is the object of said section 11 of the act of 1886. This is apparent from the quoted words in the title to said original act, the words used in said section 11 and the direction to the President contained in section 12 "to cause the governments of foreign countries which, at any of their ports, impose on American vessels a tonnage tax or light-house dues, or other equivalent tax or taxes, or any other fees, charges, or dues, to be informed of the provisions of the *preceding section*, and invited to co-operate with the Government of the United States in abolishing all light-house dues, tonnage taxes, or other equivalent tax or taxes on, and also all other fees for official services to, the vessels of the respective nations *employed in the trade between the ports of such foreign country and the ports of the United States.*"

In order to justify the levying of this tax we must say that the word "trade" is used in said section 11 in its broadest sense. Surely a floating machine shop, like a cable supply ship, when devoted to its legitimate business, is not engaged in "the American foreign carrying trade," the encouragement of which, as we have seen, inspired said section 11. I do not think the case of the *Nymph* (1 Sumner, 516), cited by you, controlling here.

In that case, the schooner was licensed to be employed in the cod fishery, pursuant to "An act for enrolling and licensing ships or vessels to be employed in the *coasting trade and fisheries*, and for regulating the same," approved February 18, 1793. (1 Stat., 305.) The thirty-second section of said act declared that if any licensed ship or vessel should "be employed in any *other trade*" than that for which she was licensed, she with her tackle, apparel, and furniture, and the cargo found on board her should be forfeited. It appeared that the *Nymph* had been employed in the mackerel fishery without the special license provided in the act of May 24, 1828. (4 Stat., 312.) Up to the passage of said act, all the bank and coast fisheries had been carried on under a cod-fishing license, the law providing for but two forms of fishing licenses—one for the cod and the other for the whale fisheries. It was held that under the act of 1828 the mackerel fishery was separate and distinct from the cod fishery and required a special license, that the word "trade," as used in the act of 1793, embraced the fisheries, and that under the thirty-second section of said act the *Nymph* was liable to forfeiture by reason of her employment in a "trade" other than that for which she was licensed. As before seen, under the act of 1793 the only cases in which a license was required was for vessels employed in the coasting trade, or the whale or cod fishery. The thirty-second section, in providing for the forfeiture of any vessel that should be "employed in any *other trade*" than that for which she was licensed, of course subjected to forfeiture vessels employed in the fisheries holding coasting trade licenses and vessels employed in the coasting trade holding fisheries licenses.

A careful analysis of section 11 of said act of 1886, and of the sections following it, convinces me that the word "trade" is used in that section in a different and more restrictive sense, and that, therefore, the *Britannia*, when this tax was imposed, was not engaged in trade within the meaning of said section.

Respectfully,

HENRY H. HOYT,  
*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

## FEDERAL BUILDING SITE IN HONOLULU.

The President is authorized, under section 91 of the Organic act of the Territory of Hawaii (31 Stat., 159), to take such of the public lands of Hawaii as he deems proper for the uses and purposes of the United States.

The Secretary of the Treasury may, if authorized by the President, accept a site for a Federal building in Honolulu acquired in exchange for public land in Hawaii and assume the custody and control thereof, no objection thereto arising under section 3736, Revised Statutes, or otherwise.

DEPARTMENT OF JUSTICE,

*March 12, 1903.*

SIR: I have your letter of the 5th instant, in which you say:

“This Department is in receipt from the Acting Secretary of the Interior of a copy of a letter addressed to that Department under date of January 31, 1903, by the governor of the Territory of Hawaii, in which he states that ‘In order to promote the erection of the Federal building in Honolulu for post-offices, for Federal court, and offices for Federal court officials and internal-revenue officials, I have adopted an arrangement with the Bishop estate whereby that estate will grant a lot in the center of Honolulu for such purpose, in exchange for certain public lands, including business lots, in the lower part of the city, near the wharves, a fish pond, and a piece of country land on the island of Hawaii, a part of which is rice land and the rest wild land. \* \* \* The proposed arrangement is subject to the acceptance by the Secretary of the Treasury of the lot in question for the site of a Federal building.’

“The Department has the honor to request to be advised whether in your opinion a Federal site can be acquired in the manner suggested, and whether, in the absence of legislation authorizing the acquisition of a Federal building site in the city of Honolulu, this Department can legally assume the custody and control of land acquired in the manner aforesaid for the purpose indicated.”

The joint resolution of annexation recites that the Government of the Republic of Hawaii cedes and transfers to the United States the ownership of all public, Government, or Crown lands, public buildings, etc., and all other public

property, together with every right and appurtenance thereunto belonging.

The Organic act of the Territory of Hawaii of April 30, 1900 (31 Stat., 159), in section 91, provides: "That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or the Governor of Hawaii."

Section 73 of the same Organic act provides: "That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this act, shall continue in force until Congress shall otherwise provide."

It thus appears that public lands in Hawaii are under the control of the laws and the government of the Territory of Hawaii, and that the President is authorized to take such land as he deems proper for the uses and purposes of the United States.

Should the President direct a particular tract of public lands to be taken for the uses of the United States, it would thereupon become land set apart for such uses, and the custody and control thereof could be assigned by the President to the appropriate department, which in the case stated by you would be the Treasury Department.

The question remains, however, whether a tract of land now in private ownership can be converted into public land so as to come under the power of the President to take such land.

This, under section 73 of the Organic act, is a question arising under the "laws of Hawaii relating to public lands," and under such laws (sec. 169) the Minister of the Interior, by and with the authority of the Executive Council, was authorized to lease, sell, or otherwise dispose of the public lands in such manner as he might deem best for the protection of agriculture and the general welfare of the Republic,

subject to such restrictions as may from time to time be expressly provided by law.

And it was also provided that no sale of one land or lot exceeding \$5,000 in value should be made without the consent of the President.

Ordinarily, transfers of Government lands, excepting under the homestead law of 1892, were to be made at public auction conducted by the Minister of the Interior or one of his clerks under his direction. This was required by section 177 of the civil laws of 1897. By section 178 of the same civil laws it was provided that "the provisions of section 177 shall not extend or apply to cases where the Government shall, by quit-claim or otherwise, dispose of its rights in any land by way of compromise or equitable settlement of the rights of claimants, nor to cases of *exchange*, or sales of Government lands in return for parcels of land acquired for roads, sites of Government buildings, or other Government purposes."

Section 186, which embodies the first part of the land act of 1895, begins as follows: "In this act, if not inconsistent with the context, 'public lands' means all lands heretofore classed as Government lands, all lands heretofore classed as Crown lands, and all lands that may hereafter come into the control of the Government by purchase, *exchange*, escheat, or by the exercise of the right of eminent domain or otherwise except as below set forth."

The act of 1895 was a homestead act, and the phrase "except as below set forth" was used because, by the same section (186), "town lots, sites of public buildings, land used for public purposes, roads, streets, landings, nurseries, tracts reserved for forest growth and conservation of water supply, parks, and all lands which may hereafter be used for public purposes" were to remain under the control and management of the Minister of the Interior, who was to have power, with consent of the Executive Council, to turn over to the commissioners for the purposes of the act of 1895 any land or parts of land reserved for public uses.

It is clear that under the laws of the former Republic of Hawaii the Minister of the Interior, with the authority of

the Executive Council, and in case the land should be worth \$5,000 or more, with the consent of the President, could have exchanged the public land mentioned by you for private land belonging to the Bishop estate.

What could thus have been done can, in my opinion, now be done by the Commissioner of Public Lands with the consent of the Governor, since it is clear that sections 68 and 73 of the Organic act have substituted the Commissioner of Public Lands for the Minister of the Interior and the Governor of the Territory for the President and the Executive Council united.

Should the President authorize you to do so, there is, in my opinion, no objection arising from section 3736 of the Revised Statutes, or otherwise, to your accepting the lot in question for the site of a Federal building, and thereupon assuming custody and control of such lot.

Respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

The SECRETARY OF THE TREASURY.

---

TELEGRAPH GRANT—ACCEPTANCE—POSTMASTER-  
GENERAL.

The mere filing by an individual with the Postmaster-General of an acceptance of the restrictions and obligations of the act of July 24, 1866 (14 Stat., 221), "To aid in the construction of telegraph lines, etc.," and the acts amendatory thereto, neither confers upon such person the benefits and privileges, nor subjects him to the burdens and restrictions of that act, because he is not a telegraph company organized under the laws of one of the States.

The words "any telegraph company organized under the laws of any State," used in the act of 1866, were used advisedly, and with a recognition that they did not include a "person" or an individual.

DEPARTMENT OF JUSTICE,

*March 20, 1903.*

SIR: In reply to your letter of the 6th instant, inclosing an acceptance forwarded to you by Mr. Walter W. Goode of the restrictions and obligations of the act of Congress of

July 24, 1866, entitled "An act to aid in the construction of telegraph lines," etc., and the acts amendatory thereto, and asking my opinion as to whether, since the amendatory act of February 15, 1901, an individual is entitled to the privileges and benefits of the acts referred to, I have to say:

The act of 1866, embodied in Title LXV of the Revised Statutes, grants the privileges and benefits to "any telegraph company now organized, or which may hereafter be organized under the laws of any State," and provides that the rights and privileges "shall not be transferred by any company acting thereunder to any other corporation, association, or person." So far as that law is concerned, I am of opinion that the words "telegraph company organized under the laws of any State" were advisedly used, and used with a recognition that they did not include a "person" or an individual.

To treat the law as giving the same privileges to an individual would, accordingly, be to legislate rather than to interpret. A corporation organized under the laws of one of the States would be an American corporation, subject to State control. If we substitute "individual," there is nothing in the law to require the individual even to be an American citizen.

As for the so-called amendatory law of February 15, 1901, that law does not purport to be an amendment of the other. Under the former, acceptances are to be filed with the Postmaster-General, who is to fix the rates for official messages. Under the latter, the Secretary of the Interior is authorized, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, Cal., for electrical plants, poles, and lines for the generation and distribution of electrical power and for telephone and telegraph purposes, and for canals, ditches, pipes, etc., "by any citizen, association, or corporation of the United States." And the law contains this proviso:

*Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the

provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain.

This law was passed soon after the decision of the Supreme Court in the case of *Richmond v. Southern Bell Telephone Company* (174 U. S., 761), that telephone companies had no rights under the law of 1866. It expressly mentions *any citizen* of the United States and, therefore, there is no doubt that the law of February 15, 1901, embraces *individuals who are citizens*. Whether Mr. Walter W. Goode is a citizen or not does not appear.

Should he obtain the permit from the Secretary, the proviso just quoted subjects such permit to all the burdens of Title LXV of the Revised Statutes.

But whether, by virtue of this proviso, "the permits given hereunder" by the Secretary of the Interior carry all the privileges and benefits of Title LXV does not seem to be, properly speaking, a question arising in the administration of your Department, by reason of the mere filing of Mr. Goode's paper purporting to accept the provisions of the act of 1866. There is nothing before me—and, so far as I am advised, nothing before you—except that paper. There is nothing before me indicating that Mr. Goode is claiming to be entitled to the privileges and benefits of the act of 1866 (Title LXV), after having obtained a permit from the Secretary of the Interior.

I am of opinion that his merely filing with you the paper you sent me neither confers upon him the benefits and privileges, nor subjects him to the burdens and restrictions of the act of 1866, because he is not a telegraph company organized under the laws of one of the States.

I return Mr. Goode's paper.

Very respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

THE POSTMASTER-GENERAL.



## NAVAL OFFICERS—RELATIVE RANK—PARDON.

The granting of a pardon to a naval officer for the purpose of restoring him to his original position on the Navy list, under the belief that a nomination intended to accomplish that end had failed because it had not been directly confirmed by the Senate, but which, in reality, had been confirmed by the advancement of another officer nominated at the same time, did not operate to advance such officer beyond the relative position he originally held on the list.

The effect of a pardon is to put an end to the infliction of further punishment. In the present instance, it merely operated to end any doubt there might be as to the legality of the restoration of such officer to his original position.

DEPARTMENT OF JUSTICE,  
*March 23, 1903.*

SIR: I have the honor to acknowledge the receipt of your letter of November 8 last, with inclosures, asking for my opinion "as to whether or not Captain McCalla is entitled, as he claims, of right and by law to a place on the Navy register five numbers above Captain Chadwick," which would be six numbers above his present position.

The facts upon which Captain McCalla bases his claim are as follows: On May 15, 1890, Capt. Bowman H. McCalla, then a commander in the Navy, ranking next after Commander Caspar F. Goodrich, was sentenced by a court-martial "to be suspended from rank and duty for a period of three years, and to retain his present number on the list of commanders while so suspended." On December 24, 1891, the unexpired portion of this sentence was remitted. Commander McCalla had then lost nine numbers, and, by reason of such loss of numbers, his name appeared nine numbers below his original position and immediately following that of Commander Charles H. Davis.

In a letter dated August 10, 1898, your Department invited the attention of the President to the meritorious services of certain naval officers in Cuban waters during the war with Spain and recommended prompt recognition by the Government of such services. The following recommendation was made in the case of Captain McCalla: "Commander Bowman H. McCalla, commanding the *Marblehead*,

for eminent and conspicuous conduct in battle off the coast of Cuba, to be restored to his original place on the Navy list, so that his name shall appear on the list of captains next after that of Capt. Caspar F. Goodrich."

This recommendation was approved by the President, and Captain McCalla was subsequently nominated accordingly. The Senate, however, failed to act directly upon this nomination, and Captain McCalla's name was therefore again placed in the position on the list which he held prior to such advancement—i. e., next after that of Capt. Charles H. Davis. While at the time this nomination was made he had lost nine numbers, he was really only six numbers below his original position, owing to changes by reason of death and advancement which had eliminated the names of three officers.

On March 3, 1899, Commander McCalla having in the ordinary course reached No. 1 on the list of commanders, and a vacancy occurring in the grade of captains, received and accepted the routine promotion and appointment to the grade of captain.

On February 6, 1900, certain questions affecting the status and pay of Captain McCalla and other officers were submitted to the Attorney-General by the Secretary of the Treasury upon the suggestion of the Comptroller; and on February 19 an opinion was rendered that the advancement of McCalla, on August 10, 1898, was not nugatory, as your Department had supposed, by reason of the failure of the Senate to confirm such advancement in terms; but that, on the contrary, the Senate, having confirmed the nomination of another officer (Lieutenant-Commander Pillsbury) "to be a commander from the 10th day of August, 1898, vice Bowman H. McCalla, advanced and promoted," thereby assented to and confirmed the advancement and promotion of McCalla.

As before seen, Captain McCalla, on August 10, 1898, had suffered a net loss of only six numbers by reason of his sentence. By operation of the "Personnel act" of March 3, 1899, Captains Andrade, Lowe, and Robinson, formerly engineers with relative rank below that of Captain McCalla

at the time his sentence took effect, were placed in the line above McCalla, your Department supposing that his advancement of August 10, 1898, had failed. Under date of March 9, 1900, the Secretary of the Navy, in a letter addressed to the Attorney-General, recommended that a pardon be granted Captain McCalla. It is apparent that your Department did not then know of the above-mentioned opinion of this Department concerning the advancement and promotion of McCalla on August 10, 1898, for, after reviewing briefly the history of the case, the Secretary said:

“Captain McCalla’s name at this time appears upon the Navy list as No. 61, immediately below that of Capt. Charles H. Davis, instead of as No. 52, immediately below that of Capt. Caspar F. Goodrich, as would have been the case in the natural order of advancement if Captain McCalla had suffered no loss of numbers.

“In a letter dated August 10, 1898, the Department invited the attention of the President to the case of certain officers of the Navy whose services in Cuban waters during the war with Spain were regarded as so meritorious as to entitle them to prompt recognition by the Government, and recommended advancement in rank as a suitable measure of reward. In the case of Captain (then Commander) McCalla, the Department’s recommendation was as follows:

“‘Commander Bowman H. McCalla, commanding the *Marblehead*, for eminent and conspicuous conduct in battle off the coast of Cuba, to be restored by the President to his original place on the Navy list, so that his name shall appear on the list of captains next after that of Capt. Caspar F. Goodrich.’

“This recommendation was approved by the President, and Captain McCalla was subsequently nominated accordingly, but the nomination was not confirmed by the Senate.

“In view of the fact that if this nomination had been confirmed Captain McCalla would have been thereby restored to his original place on the Navy list; in consideration of the gallant conduct and efficient services rendered by this officer during the recent war with Spain, I have the honor to recommend that a full and unconditional pardon be issued to Captain McCalla.”

This letter of recommendation was transmitted to the President, and on March 12 an unconditional pardon was granted, the pardon setting forth that—

“Whereas, the services of the said Bowman H. McCalla in Cuban waters during the war with Spain are regarded as so meritorious as to entitle them to prompt recognition by the Government; and,

“Whereas the Secretary of the Navy recommends that the said Bowman H. McCalla be pardoned:

“Now, therefore, be it known that I, William McKinley, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant unto the said Bowman H. McCalla a full and unconditional pardon.”

Immediately upon the issuance of this pardon Captain McCalla was restored to the place on the Navy list held by him prior to his trial by court-martial in 1890. He was thus given No. 52 upon the Navy list instead of No. 61, which he bore before the pardon. Subsequently, the attention of your Department was called to the opinion of February 19, 1900, previously referred to, and in conformity with that opinion the Navy Register was corrected so as to show that McCalla attained his old position on the list and a captaincy on August 10, 1898, the date of the recess advancement above referred to. A commission as captain, dated April 22, 1901, but taking effect from August 10, 1898, was issued to him accordingly. On March 8, 1901, Captain McCalla was advanced three numbers in the grade of captain for eminent and conspicuous conduct in battle upon recommendation of your Department, nomination by the President, and confirmation by the Senate, thus placing him three numbers higher on the Navy list than he was before his trial by court-martial, which relative position he now holds. The nomination was in the following terms: “I nominate Capt. Bowman H. McCalla to be advanced three numbers in rank, from the 8th day of March, 1901, for eminent and conspicuous conduct in battles engaged in by relief column under Vice-Admiral Seymour, to take rank next after Capt. Richard P. Leary.”

The Senate confirmed this nomination, and Captain McCalla accepted a commission issued in pursuance thereof. He now, in effect, claims that the commission which he then accepted should have given him rank six numbers higher on the Navy list than it in fact did.

The Coghlan case cited by counsel for Captain McCalla can not be said to sustain the contention in this case. In 1876 Admiral Coghlan, then a lieutenant-commander, was sentenced by court-martial to be suspended one year and to retain his present number in grade. He lost thirteen numbers by reason of the sentence. In June, 1898, he was by advancement given six of the numbers he had lost. On April 5, 1902, he was pardoned and then given his original relative position on the Navy list, which carried him to No. 1 on the list of captains. On April 10, 1902, a vacancy occurring in the grade of rear-admiral through the retirement of Rear-Admiral Farquhar, Captain Coghlan was *in regular course* promoted to a rear-admiral. It will be noted that the pardon did not operate to carry Coghlan beyond his original relative position on the Navy list.

The contention made in behalf of Captain McCalla that "degradation from or diminution of relative rank and position" is a *continuing* punishment, and thus subject to revision by the President, is conceded. In the Coghlan case, Attorney-General Devens, in 17 Opin., 32, said:

"The law of the service assigns to each officer a rank in his grade and in the line of promotion corresponding with the date of his commission, and 'when this order or disposition is interrupted, as in the case under consideration, through the intervention of a court-martial proceeding, it can only remain so by the continuing operation of the penalty imposed, which may be said to act as a punishment from day to day as long as the officer affected is excluded from the enjoyment of his previous status.'

"It has therefore been held that a pardon of the President will restore an officer, whose rank has been reduced by a court-martial, to his former relative rank according to the date of his commission, the officer losing, of course, such opportunities for promotion as might in the meantime have occurred. (12 Opin., 547.)"

It is clear that when the Secretary recommended and the President granted a pardon to Captain McCalla they both supposed the advancement of August 10, 1898, abortive, since the recommendation is based upon that assumption and the pardon is predicated upon the recommendation. The Senate had, as we have seen, failed to act directly upon this appointment, and Captain McCalla had been in fact again reduced in number and to the grade of commander, which position he held prior to said appointment. It is apparent that when Captain McCalla received and accepted the routine promotion and appointment to the grade of captain on March 3, 1899, he understood that the appointment of August 10, 1898, was without effect. It is also apparent that the Senate, in directly consenting to this routine appointment, supposed the previous appointment had failed for want of such consent.

But, even assuming that the President when he granted the pardon knew that Captain McCalla was then entitled without a pardon to his original place on the list, it does not follow that he is now entitled to an additional six numbers. If, as has been contended and conceded, the sentence of the court-martial was a continuing sentence, the President on August 10, 1898, by advancing the captain six numbers, or all that he had lost, thereby did away with the penalty and put an end to the punishment. It might well be said that the President, entertaining some doubt about the legality of this advancement, which, as we have seen, the captain had at the time of the pardon received no benefit from, granted the pardon to supplement and make sure such advancement.

The effect of a pardon is to put an end to the infliction of further punishment. The punishment in this case was the loss of numbers, and the President put an end to that punishment when he advanced the captain six numbers "to restore him to his original place on the Navy list." If any doubt remained as to the legality of the advancement, the pardon put an end to that doubt.

In view of the fact that when the pardon was granted the Executive had in effect already remitted the penalty attached to the sentence of the court-martial, I am of the opinion

that Captain McCalla is not entitled, because of such pardon, to an additional advance of six numbers.

Respectfully,

P. C. KNOX.

The SECRETARY OF THE NAVY.

---

CUSTOMS LAWS—TOBACCO GROWN IN PORTO RICO.

Tobacco grown in Porto Rico after the cession of that island to the United States and brought into this country for warehousing, and afterwards exported to Canada and thence returned to the United States, is within the benefits of paragraph 483 of the act of July 24, 1897 (30 Stat., 195), but subject to the internal-revenue tax provisions of section 3 of the act of April 12, 1900 (31 Stat., 77).

DEPARTMENT OF JUSTICE,

*April 1, 1903.*

SIR: I have the honor to acknowledge the receipt of your letter of March 2 last, relative to certain 5 bales of leaf tobacco which were brought from Porto Rico by Hamburger Bros. & Co., and entered for warehousing at New York on January 6, 1900, and afterwards exported to Canada and thence returned to the United States. It appears that this tobacco was grown in Porto Rico after April 11, 1899, the date the ratifications were exchanged of the treaty with Spain under which the Island of Porto Rico was ceded to the United States.

You ask whether these 5 bales of tobacco can be considered "articles the growth, produce, or manufacture of the United States" exported and returned within the meaning of paragraph 483 of the act of July 24, 1897.

Since this tobacco was grown in Porto Rico after that island was ceded to the United States, the reasons assigned for my opinion of May 19, 1902 [ante, p. 55], relative to certain articles of Porto Rican origin exported from Porto Rico seem to be applicable here. I am therefore of the opinion that this tobacco is within the benefits of said paragraph 483, subject, however, to the internal-revenue tax provisions in section 3 of the Foraker act of April 12, 1900.

Respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

**SECRETARY OF THE TREASURY—APPRAISER OF CUSTOMS  
AT PITTSBURG, PA.**

The office of appraiser of customs in the collection district of Pittsburg, Pa., having been abolished in 1880 by the Secretary of the Treasury, under the authority conferred upon him by section 2653, Revised Statutes, that officer has no authority to revive it. By abolishing the office the Secretary exhausted all his power in the premises, and Congress alone can re-create it.

**DEPARTMENT OF JUSTICE,***April 2, 1903.*

SIR: I have the honor to reply to your verbal request of the 31st ultimo for my official opinion upon the question whether the Secretary of the Treasury has authority to revive the office of appraiser of customs in the collection district of Pittsburg.

At the time of making this request you submitted to me for my consideration certain letters from the Treasury Department, among which is a copy of an order dated February 13, 1880, abolishing the office of appraiser of customs at Pittsburg, Pa., made by John Sherman, then Secretary of the Treasury, under authority contained in section 2653 of the Revised Statutes of the United States. In my opinion, that order of the Secretary was valid and the office of appraiser of customs at Pittsburg no longer exists.

Section 2544 of the Revised Statutes of the United States provides: "There shall be in the collection-districts of the State of Pennsylvania the following officers: \* \* \* In the district of Pittsburg, a surveyor, and an appraiser." Act of March 18, 1872 (17 Stat., 41).

By the foregoing act the office of appraiser of customs at Pittsburg was created, and section 2730 of the Revised Statutes made provision for a salary. Act of February 18, 1875 (18 Stat., 318).

Section 2653 of the Revised Statutes provides as follows: "The Secretary of the Treasury is hereby authorized, whenever he shall think it advantageous to the public service, to abolish or suspend the office of naval officer, or any other subordinate office in any collection district of the United States, except in Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, Portland in Maine, and San



Francisco, and to assign the duties of the office or any other subordinate office so abolished or suspended to a deputy collector or inspector of customs; and so much of all fines, penalties, and forfeitures as would otherwise inure to either of such naval officers shall, after the discontinuance of their offices, respectively, be paid into the Treasury of the United States, and there credited to the fund for defraying the expenses of collecting the revenue from customs."

Such was the law relating to the office of appraiser of customs at Pittsburg as it existed in 1880, when the Secretary of the Treasury, under the authority contained in section 2653, presumably "deemed it advantageous to the public service" to take some action with reference to certain "subordinate offices" in certain collection districts in the United States other than those specifically excepted from the operation of said section.

The order of the Secretary of the Treasury is as follows:

TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
*Washington, February 13, 1880.*

*Ordered:* That by virtue of the authority vested in the Secretary of the Treasury by section 2653, Revised Statutes of the United States, the following offices, now vacant, are hereby abolished:

*Surveyors of customs.*—Eastport, Me.; Alexandria, Va.; Petersburg, Va.; Houston, Tex.; Portsmouth, N. H.; Norfolk, Va.; West Point, Va.; Richmond, Va.; St. Andrews, Fla.

*Appraisers of customs.*—Pittsburg, Pa.; Mobile, Ala.; Louisville, Ky.; St. Paul, Minn.; Norfolk, Va.; Evansville, Ind.; Memphis, Tenn.; Milwaukee, Wis.

JOHN SHERMAN, *Secretary.*

It will be observed that said section 2653 committed to the discretion of the Secretary of the Treasury a choice either to "abolish" or "suspend" said office of appraiser of customs whenever he should deem such action proper, and it is apparent from the order above quoted that the Secretary deemed it advantageous to the public service to "abolish" rather than "suspend" the several subordinate offices therein enumerated. I think there can be no question as to the power of Congress to delegate to an executive officer of the Government, such as the Secretary of the Treasury, the authority to abolish offices of the character described in section 2653.

The only question, therefore, is whether, after the office of appraiser of customs at Pittsburg has been abolished by the Secretary of the Treasury, it is possible for the Secretary or any other executive officer of the Government to revive or re-create such office.

If the Secretary of the Treasury had elected "to suspend" said office of appraiser of customs, under the power in him vested, an entirely different question would now be presented for consideration; but having elected "to abolish" the office it seems to me clear that from the day upon which said order was issued the office of appraiser of customs at Pittsburg ceased to exist. If the Secretary of the Treasury is now vested with the power to revive or re-establish the office under consideration, the power to "abolish," which he has already exercised, would manifestly be no greater than, nor would in any way differ from, the power to "suspend."

My conclusion is, therefore, that when the Secretary of the Treasury made the order above mentioned abolishing the office of appraiser of customs at Pittsburg he exhausted all his power in the premises and that his authority relative to that office from that time has been "functus officio." As the agent of Congress, with respect to his power to abolish the office in question, the Secretary of the Treasury has completed the business which had been intrusted to him and, in my judgment, Congress alone has the power to re-create the office.

In view of the statement contained in certain communications from the Treasury Department, herewith submitted, relative to the great increase of business at said port of Pittsburg during the past five years (the increase being over 300 per cent), it is with regret that I have reached this conclusion, as I should be pleased to find some authority in law for reviving the office of appraiser of customs at said port.

All papers submitted to me relative to the question herein considered are herewith returned.

Very respectfully,

P. C. KNOX.

The PRESIDENT.

EVICTION OF UNLAWFUL OCCUPANTS OF PUBLIC LANDS IN  
THE DISTRICT OF COLUMBIA.

The only intent of section 1797, Revised Statutes, as amended by the act of April 28, 1902 (32 Stat., 152), is to empower the United States marshal of the District of Columbia to eject summarily transient or disturbing persons from the public grounds in the District under the direct supervision of the Chief of Engineers, and does not apply to occupants who have been in actual possession, under a claim of right, for a long period of years. In such cases the Government should apply to the courts to obtain possession.

DEPARTMENT OF JUSTICE,

*April 4, 1903.*

SIR: I have the honor to acknowledge the receipt of your communication of December 28, 1902, requesting an opinion in accordance with a recommendation of the Chief of Engineers, U. S. Army, accompanied by the letter of that officer and other documents.

My attention is called to an amendment of section 1797, Revised Statutes, contained in the legislative, executive, and judicial appropriation act, approved April 28, 1902 (32 Stat., 152), providing: "That the Chief of Engineers shall have charge of the public buildings and grounds in the District of Columbia, under such regulations as may be prescribed by the President, through the War Department, except those buildings and grounds which are otherwise provided for by law; and when it shall be made to appear to the said Chief of Engineers, or to the officer under his direction having immediate charge of said public buildings and grounds, that any person or persons is in unlawful occupation of any portion of said public lands in the District of Columbia, it shall be the duty of said officer in charge thereof to notify the marshal of the District of Columbia in writing of such unlawful occupation, and the said marshal shall thereupon cause the said trespasser or trespassers to be ejected from said lands, and shall restore possession of the same to the officer charged by law with the custody thereof."

I am asked whether the ownership of the United States, in a tract of land at the westerly end of Virginia avenue on the banks of Rock Creek, is sufficiently clear to justify the placing of the notice of eviction of occupants in the hands of the United States marshal of the District of Columbia,

as contemplated by the above statute. The inquiry really is, whether the marshal is authorized to summarily eject, without warrant or process, persons alleged to be trespassers, from the premises described.

I am informed the occupants have been in actual possession, under a claim of right, for a long period of years. They have made extensive improvements and claim title. The validity of this claim is a question for judicial determination. The only intent of the statute cited is to empower the marshal to eject summarily transient or disturbing persons from the public grounds under the direct supervision of the Chief of Engineers. The control of the public lands is somewhat extended by the act. But when the lands have been occupied, under a claim of right of possession, for a long period of time, the Government should apply to the courts to obtain possession by regular proceedings in ejectment or by some other provided statutory remedy.

I return the papers submitted to me.

Very respectfully,

W. A. DAY,

*Acting Attorney-General.*

THE SECRETARY OF WAR.

---

RESERVATIONS IN STATE CESSIONS OF LANDS TO THE  
UNITED STATES.

The act of Louisiana, approved June 30, 1892, ceding jurisdiction to the United States over certain lands in that State for public purposes, and providing for the purchase and condemnation thereof, satisfies the requirements of section 355 R. S., and no further cession of jurisdiction is legally required.

The settled construction of the Department of Justice is that the "consent" of the legislature of a State to the purchase of lands therein by the United States, required by section 355 R. S., must be free from any conditions or reservations inconsistent with the exercise by Congress of "exclusive legislation" thereof; but the reservation by a State of the right to serve and execute its civil and criminal process in the place ceded has always been held permissible.

DEPARTMENT OF JUSTICE,

*April 16, 1903.*

SIR: In your letter of the 9th ultimo, submitting two acts of the general assembly of the State of Louisiana, approved, respectively, July 6, 1882, and June 20, 1892, you request

to be advised whether, in my opinion, "the last-named act, or both read *in pari materia*, if such reading is justified, cede such jurisdiction to the United States as is contemplated by Article I, section 8, clause 17, of the Constitution of the United States, and required by section 355, Revised Statutes of the United States."

Each of the acts referred to is entitled "An act to cede jurisdiction to the United States over certain lands, and for the purchase and condemnation thereof." Their first sections are also the same, and provide:

"*Be it enacted by the general assembly of the State of Louisiana*, That the United States shall have power to purchase or condemn in the manner prescribed by law, upon making just compensation therefor, any land in the State of Louisiana, not already in use for public purposes, required for custom-houses, court-houses, arsenals, national cemeteries, or for other purposes of the Government of the United States."

Section 2 of the act of 1882 provides:

"SEC. 2. *Be it further enacted, etc.*, That the United States may enter upon and occupy any land which may have been or may be purchased or condemned, or otherwise acquired, and *shall have the right of exclusive legislation and concurrent jurisdiction*, together with the State of Louisiana, over such land and the structures thereon, and shall hold the same exempt from all State, parochial, municipal, or other taxation."

The second section of the act of 1892 is in these words:

"SEC. 2. *Be it further enacted, etc.*, That the United States may enter upon and occupy any land which may have been, or may be purchased or condemned, or otherwise acquired, and *shall have the right of exclusive jurisdiction* over the property so acquired during the time that the United States shall be or remain the owner thereof for all purposes, *except the administration of the criminal laws of said State*, and the service of civil process of said State therein, and shall hold the same exempt from all State, parochial, municipal or other taxation."

I. These two acts, differing only, and as they do, in respect to the nature of the jurisdiction ceded, or purporting to be

ceded to the United States over the lands purchased, can not be read *in pari materia*. The act of 1892 must therefore be taken as the final and exclusive expression of the legislative will on the subject.

II. It is the settled construction of this Department that the "consent" of the legislature of the State to the purchase of lands therein by the United States, required by section 355 of the Revised Statutes (originally section 3 of the resolution of September 11, 1841; 5 Stat., 468), before any public money shall be expended for the purpose of erecting thereon any public structure or building referred to, must be free from any conditions or reservations inconsistent with the exercise by Congress of "exclusive legislation" (i. e., exclusive jurisdiction) thereover, as provided in Article I, section 8, clause 17, of the Constitution. The customary reservation by the State of the right to serve and execute its civil and criminal process in the place purchased, has, however, always been held permissible, the object of this reservation being, it is said, simply to prevent such place from becoming a sanctuary for fugitives from justice, and it operates merely as "an agreement of the new sovereign to permit its free exercise as *quoad hoc* his own process." (Mr. Justice Story, in *United States v. Cornell*, 2 Mason, 60, 66.)

It is manifest, however, that a reservation to the State, such as is contained in the Louisiana act of 1892, of the right to administer its criminal laws in the place purchased, is inconsistent with the exercise of "exclusive legislation" thereover by Congress, as it leaves to the State "the cognizance of offenses against its laws committed thereon, as fully as the same existed before such acquisition." (20 Opin., 613.)

It is not perfectly clear from the authorities what is the effect of such a reservation; i. e., whether the consent expressed would be legally operative or the reservations alone void.

The question was considered by Mr. Cushing (8 Opin., 102), who held that an act of the State of South Carolina, in which the consent of the legislature to the purchase was coupled with conditions reserving to the State all jurisdic-

tion over the land and public officers or other persons thereon, did not satisfy the resolution of September 11, 1841.

Mr. Cushing affirmed this view in 8 Opin., 418, respecting a similar act of the State of Iowa, which provided that "nothing in this act shall be so construed as to prevent, on such lands, \* \* \* the courts of this State from exercising jurisdiction of crimes committed thereon."

A different view was taken by Attorney-General Bates, in passing upon the sufficiency of an act of the legislature of New York (10 Opin., 34). In that case, the act referred to expressed the consent of the legislature to the purchase by the United States of certain land in the city of New York for the purposes of a post-office, and purported to cede jurisdiction over the lands purchased "subject to the reservations hereinafter mentioned," section 3 of the act providing: "The said consent is given and the said jurisdiction is ceded upon the express condition" that the State should retain concurrent jurisdiction with the United States for the service of its civil and criminal process in the place purchased. (Laws N. Y., 1861, c. 118, p. 212.) This particular reservation was, as already indicated, permissible; but into that fact Mr. Bates, under the position which he assumed, did not think it necessary to inquire, holding that if the New York act did not amount to consent it was null, but that, on the whole, it did give consent to the purchase.

Mr. Olney followed Mr. Cushing's view, holding (20 Opin., 611) insufficient an act of the State of Wisconsin in which the consent expressed was coupled with a reservation to the State of concurrent jurisdiction over offenses against its laws committed on the place so purchased.

But there is, I think, a clear distinction between acts of the character passed upon by Mr. Cushing and Mr. Olney, in which the reservation of jurisdiction is made an express condition of the consent, and an act which unequivocally expresses the consent of the legislature and does not make any objectionable reservation which may contain an absolute and inseparable condition of the consent. In such a case there seems to be no good reason for holding that the reservation invalidates the entire act.

The Louisiana act of 1892 is of the latter character. By the first section of that act the consent of the legislature to the purchase or condemnation of lands within that State by the United States for public purposes is plainly and unequivocally given, and there is nothing whatever in the second section, or any other part of the act, to indicate that the reservation of jurisdiction which it contains is made an express condition of the consent.

The act may therefore be taken as satisfying the requirements of section 355 of the Revised Statutes, and no further cession of jurisdiction is legally required.

Respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

---

CUSTOMS LAWS—STORAGE CHARGES, ETC., COLLECTED IN  
PORTO RICO.

Storage charges, fines, penalties, and forfeitures, and other collections, not duties or taxes, made by customs officers in Porto Rico in the administration of the customs laws, should be deposited to the credit of the Treasurer of the United States.

What is expressed in a statute is exclusive when it is creative of some right, power, or grant.

DEPARTMENT OF JUSTICE,

*April 17, 1903.*

SIR: I have the honor to acknowledge the receipt of your letter of March 12 last, in which you request my opinion "whether storage charges, fines, penalties, and forfeitures, and other collections, not duties or taxes, made by customs officers in Porto Rico in the administration of the customs laws, should be deposited to the credit of the Treasurer of the United States."

Section 4 of the Porto Rican or Foraker act of April 12, 1900 (31 Stat., 78), provides, *inter alia*, that "The Secretary of the Treasury shall designate the several ports and sub-ports of entry in Porto Rico and shall make such rules and regulations and appoint such agents as may be necessary to collect the duties and taxes authorized to be levied, collected, and paid in Porto Rico by the provisions of this



act, and he shall fix the compensation and provide for the payment thereof of all such officers, agents, and assistants as he may find it necessary to employ to carry out the provisions hereof:

*“Provided, however, That as soon as a civil government for Porto Rico shall have been organized in accordance with the provisions of this act and notice thereof shall have been given to the President, he shall make proclamation thereof, and thereafter all collections of duties and taxes in Porto Rico under the provisions of this act shall be paid into the treasury of Porto Rico, to be expended as required by law for the government and benefit thereof, instead of being paid into the Treasury of the United States.”*

Authority to divert from the Treasury of the United States “storage charges, fines, penalties, and forfeitures, and other collections, *not* duties or taxes,” must be found in the preceding section, if at all, since there is no other provision of law granting such authority.

It will be noticed that the Secretary of the Treasury designates the several ports and sub-ports of entry in Porto Rico and appoints the agents “to collect the duties and taxes authorized to be levied, collected, and paid” therein by the provisions of the act. It is these same “duties and taxes” that are specifically granted to Porto Rico.

Section 3687 Rev. Stat., as amended by the act of August 18, 1894 [28 Stat., 391], is as follows: “There is appropriated, out of any money in the Treasury not otherwise appropriated, the sum of two million seven hundred and fifty thousand dollars, for the expenses of collecting the revenue from customs for each half year, in addition to such sums as may be received from fines, penalties, and forfeitures connected with the customs, and from fees paid into the Treasury by customs officers, and from storage, cartage, drayage, labor, and services. And to pay the salaries of watchmen and night watchmen in custom-houses, who may be designated by the Secretary of the Treasury to act as inspectors of customs.”

By the act of June 15, 1880, the Secretary of the Treasury is required to make report to Congress each year of the amount received under said section 3687, and also furnish a

statement showing in detail how the money appropriated under said section has been expended.

Under section 2 of "An act to amend the customs revenue laws and to repeal moiety," approved June 22, 1874 (18 Stat., 186), the proceeds of all fines, penalties, and forfeitures under the customs revenue laws are directed to be paid into the Treasury of the United States, and the act provides that compensation to informers shall be paid, under the direction of the Secretary of the Treasury, out of money appropriated for that purpose.

It is a familiar maxim in the construction of statutes that what is expressed is exclusive when it is creative of some right, power, or grant. The language of section 4 of the Porto Rican act is clear and unambiguous. It grants "collections of duties and taxes" only. If Congress intended that receipts from sources other than duties and taxes should be paid into the Porto Rican treasury it used no language appropriate to that end. As above seen, the receipts from fines, penalties, and forfeitures, etc., are specifically directed to be paid into the Treasury of the United States, and are appropriated under a permanent annual appropriation for a specific purpose. If there is an omission in the law, the legislature, and only the legislature, can supply it.

I must therefore answer your inquiry in the affirmative.

Respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

---

#### LOYAL CREEK CLAIMS—ATTORNEYS' FEES.

The attorneys for the Creek Indians in the so-called "Loyal Creek Claims" are not entitled to the fees mentioned in the Indian appropriation act of March 3, 1903 (32 Stat., 994), until the amount therein appropriated, \$600,000, has been accepted by the Creek Nation in full payment of these claims.

This appropriation is in the nature of a compromise of all the Loyal Creek claims, the payment of the \$600,000 being conditioned upon its acceptance by said Indians; and if not accepted, there will be no fund available from which to pay said attorneys.

DEPARTMENT OF JUSTICE,

*April 22, 1903.*

SIR: I have the honor to acknowledge the receipt of your letter of the 13th ultimo, inclosing a letter from Messrs. S. W. Peel and David M. Hodge, and asking my opinion whether, under the terms of the following paragraph of the Indian appropriation act of March 3, 1903, the said Peel and Hodge are entitled to receive the legal fees therein mentioned in advance of the acceptance by the Indians of the appropriation of \$600,000 as full payment and satisfaction of all claim and demand growing out of the so-called "loyal Creek claims."

"In pursuance of the provisions of section twenty-six of an act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes, approved March first, nineteen hundred and one, there is hereby awarded, as a final determination thereof, on the so-called 'loyal Creek claims' named in said section twenty-six, the sum of six hundred thousand dollars, and the same is hereby appropriated out of any money in the Treasury not otherwise appropriated, and made immediately available. And the Secretary of the Treasury is hereby authorized to pay, under the direction of the Secretary of the Interior, to the loyal Creek Indians and freedmen named in articles three and four of the treaty with the Creek Nation of Indians of June fourteenth, eighteen hundred and sixty-six, the said sum of six hundred thousand dollars, to be paid to such Indians and freedmen only whose names appear on the list of awards made in their behalf by W. B. Hazen and F. A. Field, as commissioners on behalf of the United States to ascertain the losses of said Indians and freedmen as provided in said articles three and four; and such payments shall be made in proportion of the awards as set out in said list: *Provided*, That said sum shall be accepted by said Indians in full payment and satisfaction of all claim and demand growing out of said loyal Creek claims, and the payment thereof shall be a full release of the Government from any such claim or claims: *Provided, however*, That if any of said loyal Creek Indians or freedmen whose names are on said list of awards shall have died, then the amount

or amounts due such deceased person or persons, respectively, shall be paid to their heirs or legal representatives: *And provided further*, That the Secretary of the Treasury be, and he is hereby, authorized and directed to first withhold from the amount herein appropriated and pay to S. W. Peel, of Bentonville, Arkansas, the attorney of said loyal Creeks and freedmen, a sum equal to ten per centum of the amount herein appropriated, as provided by written contracts between the said S. W. Peel and the claimants herein, the same to be payment in full for all legal and other services rendered by him, or those employed by him, and for all disbursements and other expenditures had by him in behalf of said claimants in pursuance of said contract. *And further*, said Secretary is authorized and directed to pay to David M. Hodge, a Creek Indian, of Tulsa, in the Creek Nation, a sum equal to five per centum of the amount herein appropriated, which payment shall be in full for all claims of every kind made by said David M. Hodge, or by those claiming under him, by reason of any engagement, agreement, or understanding had between him and said loyal Creek Indians."

It is contended that the appropriation in the first sentence above quoted is absolute and unconditional, and that the remainder of the paragraph "provides two sources of distribution: one to the loyal Creeks themselves, and the other to the attorneys who have represented said Indians;" that the object of the two methods of payment is clear, namely, that the Interior Department being the custodian of the rolls of the Indians, it is necessary that the Secretary of the Treasury shall make the one payment under the direction of the Secretary of the Interior, "and to these payments there is attached the condition that they shall be received in full discharge of all claims against the Government;" that, the attorneys being named in the act and the amounts definitely fixed and free from conditions, Congress directed that they should be paid by the Secretary of the Treasury; that if Congress had intended that if any number of the Indians should refuse to accept their proportionate share the 10 per centum appropriated for Mr. Peel and the 5 per centum for Mr. Hodge should be reduced in that

proportion, the act would have provided that they should receive a certain per centum of the amount that should actually be paid to the Indians; that the provision for paying the attorneys is at the end of the item and the final word of the lawmaking power and therefore controlling; that the Secretary of the Treasury, and he alone, is directed in mandatory terms that before the sum appropriated "shall be depleted in any way, he shall first withhold from it the amounts designated as attorney fees, and pay them;" that the Senate was a court to determine these Creek claims and made its award and that attorneys are entitled to their fees when the judgment of the court is rendered.

The loyal Creek claims, so-called, arose from the fact that a majority of the Creek Nation adhered to the Confederate States and the minority, being loyal, were obliged to leave the territory of the nation and take refuge within the lines of the Federal army, while their property was confiscated or destroyed.

In 1866 the United States concluded a treaty with the Creeks by which the tribe ceded part of its lands for a money consideration, \$100,000 of which was to be paid to the loyal refugees in compensation for their losses, which was accordingly done in 1871. Article 4 of the treaty provided that a census of the refugees should be taken and the amount of their losses ascertained by agents of the United States, and the \$100,000 be divided in proportion to such losses.

The agents reported that the losses amounted to about \$1,900,000. The Indians claimed the whole of this and their claim was referred by the Secretary of the Interior to the Court of Claims, which held (19 C. Cls., 675) that the United States was under no obligation to pay more than the \$100,000 above mentioned.

Notwithstanding this, by an agreement with the Creek Nation, ratified by Congress on March 1, 1901, it was provided that the loyal Creek claim, among others, should be submitted to the Senate for determination, and in the event that any sum should be awarded to the Indians, provision should be made for its immediate payment.

The provisions of that agreement relating to the loyal Creek claims are contained in paragraph 26 of that act, which is as follows:

"All claims of whatsoever nature, including the 'loyal Creek claim' under article four of the treaty of eighteen hundred and sixty-six, and the 'Self-emigration claim' under article twelve of the treaty of eighteen hundred and thirty-two, which the tribe or any individual thereof may have against the United States, or any other claim arising under the treaty of eighteen hundred and sixty-six, or any claim which the United States may have against said tribe, shall be submitted to the Senate of the United States for determination; and within two years from the ratification of this agreement the Senate shall make final determination thereof; and in the event that any sums are awarded the said tribe or any citizen thereof, provision shall be made for immediate payment of same.

"Of these claims the 'loyal Creek claim,' for what they suffered because of their loyalty to the United States Government during the civil war, long delayed, is so urgent in its character that the parties to this agreement express the hope that it may receive consideration and be determined at the earliest practicable moment.

"Any other claim which the Creek Nation may have against the United States may be prosecuted in the Court of Claims of the United States, with right of appeal to the Supreme Court; and jurisdiction to try and determine such claim is hereby conferred upon said courts." (31 Stat., 869.)

The loyal Creek claim was thereafter submitted to the United States Senate during the second session of the Fifty-seventh Congress for determination and award; and while it does not appear that the Senate made a formal *award* or decree respecting said claim, it does appear that the Senate during said session took such action relative to this claim which might reasonably be construed as tantamount to a "final determination and award."

The Committee on Indian Affairs of the United States Senate at said session of Congress reported an amendment

to be inserted in the Indian appropriation bill (act of March 3, 1903), which amendment, so far as the same is material to this opinion, was as follows:

“In pursuance of the provisions of section 26 of an act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes, approved March 1, 1901, there is hereby awarded as final determination thereof on the so-called ‘loyal Creek claims,’ named in said section 26, the sum of \$1,200,000, and the same is hereby appropriated out of any money in the Treasury not otherwise appropriated, and made immediately available. And the Secretary of the Treasury is hereby authorized to pay, under the direction of the Secretary of the Interior, to the loyal Creek Indians and freedmen named in articles 3 and 4 of the treaty with the Creek Nation of Indians of June 14, 1866, the said sum of \$1,200,000, to be paid to such Indians and freedmen only whose names appear on the list of awards made in their behalf by W. B. Hazen and F. A. Field, as commissioners on behalf of the United States to ascertain the losses of said Indians and freedmen, as provided in said articles 3 and 4; and such payments shall be made in proportion of the awards as set out in said lists and shall be in full settlement and satisfaction of all claims under said articles 3 and 4 (vol. 36, Cong. Rec., 2252).”

That amendment was agreed to by the Senate; but before taking a vote thereon the attention of the Senate was most earnestly and forcibly directed to the fact that in voting upon that amendment the Senate was acting as a board of arbitration under authority contained in said paragraph 26 of the act of March 1, 1901.

Senator Quarles, of Wisconsin, said: “It has occurred to me, sir, that the Senate ought to be advised as to the nature of this amendment, and that it ought not to be passed, coming as it does solely from the committee, leaving the Senate entirely in ignorance of the fact that in regard to this amendment it is sitting as a court of arbitration and is not engaged in the ordinary method of legislation \* \* \*. This is a provision which arises out of an agreement made with the Creek Nation in 1891 (1901), whereby it is provided that the Senate shall within two years sit in the

capacity of a court of arbitration and decide upon this claim, which arises from several treaties made by this Government with the Creek Nation. *The determination of the Senate upon this proposition will amount to an award, upon which an action will lie quite independently of the fate of this provision in the other House of Congress.*" (Vol. 36, Cong. Rec., 2252.)

Notwithstanding this admonition, the Senate immediately agreed to such amendment, and the question, therefore, which very pertinently suggests itself, is whether that action of the Senate in agreeing to such amendment amounted in law to a final determination and award in the matter of the loyal Creek claim. Observe the language of this amendment: "There is hereby *awarded*, as a final determination thereof, on the so-called 'loyal Creek claims' \* \* \* the sum of \$1,200,000. (Vol. 36, Cong. Rec., 2252.)"

It is, of course, unnecessary for the purpose of this opinion to concede (and I do not wish to be so understood) that such action of the Senate amounted to an award which would bind the Government in an action, but inasmuch as the point was suggested in Congress at the time the law was under discussion, it may be considered as having had a very important bearing upon the purpose which Congress had in view when it finally inserted the proviso "that said sum shall be accepted by said Indians in full payment and satisfaction of all claim and demand growing out of said loyal Creek claims \* \* \*."

For there can be no doubt that at that time many members of Congress considered this action of the Senate in agreeing to said amendment as a "final determination and award" of the Senate sitting as a board of arbitration and binding upon the Government in accordance with the provisions contained in paragraph 26 of the agreement heretofore referred to.

But whatever force in law may be given to said amendment as agreed to by the Senate, it is nevertheless clear that before such an award could be paid by the Government it was necessary that Congress should vote to appropriate a sum of money sufficient for its liquidation. The Senate was, therefore, called upon to again act, but this time in its



legislative capacity and in conjunction with the House of Representatives. And while the Senate acting in its legislative capacity was manifestly willing to join with the House of Representatives in passing a law to appropriate a sufficient sum of money to pay an award which it had just decreed while sitting as a board of arbitration, the House was evidently unwilling to join with the Senate in making such appropriation.

Conferees were accordingly appointed, and the law in its present form was the result of their agreement and recommendation to their respective Houses. The conferees on the part of the House reported as follows:

“No. 27, the House recedes with an amendment, making the appropriation \$600,000 instead of \$1,200,000. The amendment provides for the payment of the so-called loyal Creek claim. It has been mooted for some time, and it is claimed that the Senate has heretofore been made arbiter by action of both bodies of Congress, and that, acting as such, they have determined that \$1,200,000 was just and due. The sum fixed herein is a compromise, and provision is made in the amendment that it be accepted in full payment of all claims and demands, and act as a general relief of such claim against the Government.” (Vol. 36, Cong. Rec., 2768.)

And Mr. Sherman in presenting the report of the conferees on the part of the House said: “I was about to say, Mr. Speaker, that the main item of appropriation added by this report is \$600,000 to pay the so-called loyal Creek claims.

“This is an item which the conferees on the part of the House believe to be a gratuity; that is, that it is a claim about which we believe there was no legal obligation on the part of the Government. The contention of the Senate conferees was the reverse. Their contention was that by the act of the two Houses in referring this claim to the Senate as arbitrators in the last Congress, and by the Senate appropriating in this bill, or inserting in this bill, a provision fixing the amount of the arbitration at \$1,200,000, that thereby the United States became bound to the payment of that claim of \$1,200,000.

"It was the claim which kept us in conference longer by many hours—yes, by several days—than we would have been but for this. At the conclusion of a protracted conference the House conferees receded with an amendment providing that the amount paid should be \$600,000 rather than \$1,200,000, and with a provision that the payment of this sum should be in full for all claims in satisfaction of the claims of these Indians, and the payment should be accepted as a discharge of the United States Government from those claims. The House conferees believed it wisdom under all the circumstances to dispose of this claim now by the payment of \$600,000, and believed by doing so that we would save to the Government money, because were it not paid now the Indians would surely present this claim to every succeeding Congress, and one of these days probably slip it through at \$1,200,000. So we believe—

"Mr. CURTIS. In view of the fact that the Senate had found in the arbitration for \$1,200,000.

"Mr. SHERMAN. So that we believe, in disposing of the claim as we have, we have saved the Government \$600,000." (Vol. 36, Cong. Rec., 2769.)

The law as originally proposed by the Senate in said amendment contained no condition requiring that the money awarded and appropriated should be accepted by said Indians in full payment and satisfaction. And this was entirely proper, if the amount awarded by the Senate and proposed to be appropriated was sufficient to pay the amount awarded by the Senate. And had the House of Representatives agreed to appropriate such an amount, to wit, \$1,200,000, there would have existed no reason for imposing a condition that such sum should be accepted by the Indians in full payment and satisfaction; they were bound to accept the award of the Senate by the express terms of paragraph 26 of their agreement with the United States, but the moment that Congress refused to make a sufficient appropriation to meet the award of the Senate it became necessary for Congress to insert the provision requiring acceptance on the part of the Indians in order to protect the interests of the Government. The necessity and force of such proviso, therefore, becomes

at once apparent. For had it been omitted, the Indians, after having received the \$600,000 appropriated, could immediately claim that said sum was received by them as part payment of the award which the Senate had made to them, to wit, \$1,200,000. And there would seem to be much reason for such a claim in the absence of a provision such as we find in the law.

This appropriation of \$600,000, therefore, is not absolute and unconditional, as claimed by Messrs. Peel and Hodge, but provisional; Congress having in mind that an acceptance by said Indians would operate not only as a final settlement of the "loyal Creek claims" as presented to the Senate for determination, but would also forever preclude and estop the Creek Nation, as well as the individual loyal Creek claimants, for whom said nation was acting, from thereafter asserting any claim against the Government for more money *on the theory that the Senate had awarded to them \$1,200,000, which they were absolutely entitled to.*

The law, in my judgment, is in the nature of an offer of compromise of all the loyal Creek claims and clearly contemplates releasing the Government from any liability or obligation arising from the action of the Senate as a board of arbitration.

This construction of the law finds additional support in various other matters intimately connected with the question under consideration and from a close analysis of the law itself.

It is apparent that it is not the United States that owes these attorneys. They are to be paid out of the amount "herein appropriated," namely, the \$600,000 "hereby awarded on the so-called loyal Creek claims, to be paid to the loyal Creeks and freedmen." From that amount the Secretary of the Treasury is to first withhold enough to pay the attorneys, as provided in written contracts between the attorneys and "the claimants herein."

If there is to be no fund belonging to the claimants, there would seem to be no fund applicable to the fees of their attorneys, as it is the claimants who owe the attorneys, and apparently under contracts calling for an amount equal to a per cent of what the claimants receive.

The direction to the Secretary of the Treasury to "first withhold from the amount herein appropriated and pay to S. W. Peel, etc.," follows after the authorization of the Secretary of the Treasury to pay "under the direction of the Secretary of the Interior" to the loyal Creek Indians and freedmen the same sum of \$600,000. After being directed by the Secretary of the Interior to pay (which he will not be, unless the condition is fulfilled), the Secretary of the Treasury is to first withhold and pay so much to the attorneys. The word "first" implies something to follow, which evidently is the payment to the Indians and freedmen. If the Secretary of the Treasury is not to pay the Indians and freedmen because of the failure of the condition, it is difficult to understand how effect can be given to the words "first withhold." If he is to pay, because the condition is complied with, the words "first withhold" have a very natural application.

It is suggested by Messrs. Peel and Hodge that to require an acceptance by the Indians before the attorneys should receive their fees would be placing an absurd construction upon the law, for the reason that it would be difficult, if not impossible, to obtain the unanimous consent of all the loyal Creeks and freedmen or their representatives, many of them being dead, and would make the payment of the whole \$600,000 dependent upon the will of a very small number of loyal Creeks or freedmen who might refuse to accept. But it is unnecessary to adopt such a construction of the law. It is the Creek Nation that is required to accept before the appropriation becomes available. In the bill as it left the Senate the declaration was that "*such payments* \* \* \* shall be in full settlement and satisfaction of all claims under said articles three and four;" but it was changed in conference and in lieu thereof the following provision was inserted: "Provided, That *said sum* (that is, the said sum of \$600,000) shall be accepted *by said Indians* in full payment, etc."

It is thus the whole sum of \$600,000 that is to be accepted and, according to the language of the law, not accepted by the claimants, the "loyal Creek Indians and freedmen," so repeatedly mentioned in the act, but by "said Indians."

634 *Hearing Before Tea Board of the General Appraisers.*

It is possible to hold, therefore, and such is my opinion, that an acceptance by the Creek Nation of Indians, which took up the claim of its citizens and obtained the treaty and agreement on their behalf, the nation being the natural representative of such a claim by its citizens, is a sufficient acceptance under the law. (*Thomas Connor et al. v. U. S.*, 19 Ct. Cl., 675; *The Great Western Insurance Co. v. U. S.*, 19 Ct. Cl., 206.)

From these considerations it follows, and such is my opinion, that the payment of the \$600,000 is conditional, and that inasmuch as it is barely possible that the appropriation may not be accepted by the Creek Nation, in accordance with the provisions contained in the act, in which event there would be no fund available from which to pay the attorneys in question their fees, the Secretary of the Treasury should not pay said attorneys until the condition is removed by the consent and formal acceptance of the Creek Nation of Indians, whereupon he should, before paying the "loyal Creek Indians and freedmen," first withhold from the \$600,000 the fees which the Indians have contracted and agreed to pay to the attorneys, as recited in the law.

Very respectfully,

P. C. KNOX.

The SECRETARY OF THE INTERIOR.

---

TEA BOARD OF THE GENERAL APPRAISERS—HEARING BEFORE TWO MEMBERS.

A majority of the tea board of the General Appraisers may properly hear and decide questions presented to it, and their decision is valid and binding, even though the third member of the board be not present at the hearing.

DEPARTMENT OF JUSTICE,

*April 24, 1903.*

SIR: Your letter of the 3d instant requests my opinion upon the question whether a decision signed by two members of the tea board of three General Appraisers created by the act of March 2, 1897, upon a matter heard by but two members thereof, is a valid and binding decision and

should be acted upon by the collector of customs. It appears that such a decision was rendered recently in the case of certain importations of tea at New York, and that the decision is claimed by attorneys for the importers to be invalid for the reason that the three members constituting the board did not participate in the hearing.

The act of March 2, 1897 (29 Stat., 604), "to prevent the importation of impure and unwholesome tea," provides, among other things, for the examination by an examiner of all teas brought into the United States (sec. 4); and in case either the importer or collector shall protest against the finding of the examiner as to the purity, quality, and fitness for consumption of any tea imported when compared with the proper standards, "the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reexamination by such board the tea shall be found to be inferior in purity \* \* \* the importer or consignee shall give a bond \* \* \* to export said tea \* \* \* out of the limits of the United States \* \* \* (sec. 6).

Section 8 provides that "the decision of such board shall be in writing, signed by them," and transmitted, with the record and samples of tea, to the collector.

As I understand, the doubt that has given rise to your question is not as to the power of a majority of the tea board to act, but as to the validity of such action when the matter was considered by only two of the three members.

There is no provision in the act of 1897 for a hearing by a majority of the tea board. The general rule is that an authority given to several for public purposes may be executed by a majority of their number. (*Cooley v. O'Connor*, 12 Wall., 391, and auth. cit.; cases cited in *Curtis v. County of Butler*, 24 How., 435; *United States v. Ballin*, 144 U. S., 1.) Where, however, the duty is one that requires the exercise of discretion and judgment, although a majority of the

persons to whom the authority is given may act, the full number must meet and deliberate together, unless special provision is otherwise made. (23 Am. & Eng. Ency., 2d ed., p. 368, and cas. cit.) It is stated in Sutherland on Statutory Construction, sec. 390: "Where any number of persons are appointed to act judicially in a public matter, they must all confer, but a majority may decide." And see also to the same effect, Endlich on interpretation of Statutes, page 605.

I think, however, that these rules do not apply to the present case; that Congress has so far clothed the tea board with judicial powers that it may, like a court, sit whenever a majority of its members are present. With respect to boards of a similar character, it has been held that such tribunals have the same power that belongs to courts. Thus in *Marine v. Lyon* (65 Fed. Rep., 992), the court held that the board of classification created by section 14 of the Customs Administrative act has judicial authority conferred upon it by statute, "and the phraseology implies a court." In the case of *In re Van Blunkensteyn* (56 Fed. Rep., 475), the court said that in the circuit court the return of the board is to be considered substantially as the report of a master is considered in that court, or as the record including the opinion of the court in an equity or admiralty suit is considered in an appellate court. And it is evident from the language of the opinion in *Sang Lung v. Jackson* (85 Fed. Rep., 502), where it was held that the action of the tea board in rejecting certain tea as impure and unwholesome, being a decision of fact by a tribunal to which the matter is referred by law, can not be reviewed by the courts, unless the decision interferes with a vested right and has been induced by fraud or by mistake of law, that the court takes the same view in regard to the tea board.

While the question is not free from doubt, I am of opinion, on the whole, that a majority of the tea board may properly hear and decide the questions presented to it, and that the decision of such majority is valid and binding.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

## CHINESE EXCLUSION LAWS—DEBTS “PENDING SETTLEMENT.”

An open book account of over \$1,000 of a registered Chinese laborer seeking to return to this country, with a Chinese debtor, the existence of which account has been established, is one “pending settlement” under Article II of the treaty with China of December 8, 1894 (28 Stat., 1210), and is one “unascertained and unsettled” within the meaning of section 6 of the act of September 13, 1888 (25 Stat., 476). The term “pending settlement” may mean more than “pending payment;” it may include ascertainment. The word “settlement” in legal use embraces both ideas—the idea of discharging an obligation by payment, and the idea of arriving at its amount by ascertainment and adjustment.

DEPARTMENT OF JUSTICE,

*May 9, 1903.*

SIR: Your letter of May 2 advises me that Pon Hung, a registered Chinese laborer returning to this country under a return certificate duly issued, has been excluded by the collector of customs at San Francisco and has appealed to you. The ground of exclusion is that a certain debt due the Chinaman is not of the requisite character under the law to entitle him to return. It consists of an admitted liability on open-book account, and its status appears not to have changed since the Chinaman applied for and obtained a return certificate based upon the existence of this debt. Upon this state of facts you request my opinion upon the following points:

First. Assuming that appellant has established the existence of an open account with a certain Chinese debtor, which account shows a net balance due appellant of \$1,050.75, is said debt “pending settlement” as described in the language of Article II of the treaty of December 8, 1894, or is it a debt “unascertained and unsettled, and not promissory notes or other similar acknowledgements of ascertained liability” as defined in section 6 of the act of September 13, 1888 (25 Stat., 476)?

Second. If the said debt be not such an one as is prescribed by the above-quoted treaty and law to be proven to establish the right of a returning Chinese laborer to admission, should it be deemed “property” in the sense in which that word is used for the same purpose in the treaty and law aforesaid?



The treaty (Article II) provides that the absolute prohibition of entry by Chinese laborers into the United States “shall not apply to the return to the United States of any registered Chinese laborer who has \* \* \* property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement.” The language of section 6 of the act of 1888 is: “That no Chinese laborer within the purview of the preceding section shall be permitted to return to the United States unless he has \* \* \* property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. \* \* \* If the right to return be claimed on the ground of property or of debts, it must appear that the property is bona fide and not colorably acquired for the purpose of evading this act, or that the debts are unascertained and unsettled, and not promissory notes or other similar acknowledgments of ascertained liability.”

The act of April 29, 1902 (32 Stat., 176), provides by its first section that existing Chinese-exclusion laws shall be continued “so far as the same are not inconsistent with treaty obligations.”

On behalf of the Chinaman the argument is made that the treaty, being the later expression of the law-making will, has repealed the statute. This presupposes an irreconcilable repugnancy between the two laws. To that I can not assent. It is true that in 23 Opin., 545, I held that the treaty abrogated the statute in respect to that provision of section 7 of the latter which requires consular certification of a cause of delay in returning; but this was because the treaty had changed the particular rule on that subject. Here there is no such inconsistency between the two laws. The treaty and the first paragraph of section 6 of the act use precisely the same expressions. The words of the last paragraph of the act merely amplify and construe the meaning of “property” and “debts pending settlement.” It is proper to assume that the meaning thus placed upon these words by existing law was in the minds of the negotiators of the treaty. In general, the act of 1888 has always been regarded as existing law, although doubts have been expressed and it has been held that certain portions did not

take effect or have been replaced (cases cited in 2 Supp. R. S., 141, note 1; *Li Sing v. United States*, 180 U. S., 486; *Fok Yung Yo v. United States*, 185 U. S., 296; 23 Opin., 545, *ut supra*; Id., 619, 621).

Nevertheless, I am of opinion that the law, construed as a whole, contemplates and includes a debt of the kind presented here. "Pending settlement" may mean more than "pending payment;" it may include ascertainment. The word "settlement" in legal use embraces both ideas—the idea of discharging an obligation by payment; the idea of arriving at its amount by ascertainment and adjustment. The extent to which "settlement" in these laws includes ascertainment, the process of reduction to liquidated certainty, so as to shut out an obligation definitely and concretely determined, is shown by the statute itself, where in contrast with debts "unascertained and unsettled" it specifies promissory notes or *other similar acknowledgments of ascertained liability*. Here, then, is the test. Without undertaking to show what would be included in "other similar acknowledgments," I am satisfied that ordinary book accounts are not to be included. Respecting debts of that character it is obvious that settlement may often include something more than payment. Even when the obligation is generally admitted, collection may require negotiation and the personal attention of the creditor. If it is necessary that the debt should rest wholly in claim and controversy, that it should be vague and indeterminate, as, for instance, upon complicated and unadjusted mutual accounts, then there is little room left for the operation of the law. Yet its purport and intention seem to be plain to an ordinary understanding, and, consisting in part of a treaty obligation, the principle of fair and liberal construction should be applied.

It is easy to perceive why the law excluded promissory notes from the category of debts entitling to return, since, like colorable transfers of property, they might be given to evade the law and merely to qualify an applicant when no *bona fide* indebtedness existed. The door would be opened still further to colorable and unfounded claims if it were held that the indebtedness in order to qualify must be wholly indeterminate and unadjusted; or if that avenue

were zealously guarded by the Government authorities, little would be left in actual experience under the debt category upon which to found the right.

No doubt there is risk of fraudulent pretense and certain practical difficulties respecting investigation and proof and affecting both the Government and Chinamen, whatever the form of debt; but on the whole, reasonable views require us to admit the type of indebtedness now presented within the limits of the law. The administrative control over the subject is complete; the executive authority must be satisfied after rigid investigation that the registered laborer is entitled to a return certificate, and this requirement looks *inter alia* to the reality and *bona fides* of an alleged indebtedness. I do not now assume to construe any other type of debt than the one submitted. As to that I am satisfied of its legitimate inclusion within the meaning of the treaty and the statute.

My opinion, then, is that your first question must be answered in the affirmative; that is, that this debt is one "pending settlement" under the treaty, and is one "uncertained and unsettled" within the meaning of the act. This renders it unnecessary to answer your second question.

Very respectfully,

HENRY M. HOYT,  
*Acting Attorney-General.*

THE SECRETARY OF THE TREASURY.

#### EMINENT DOMAIN—PHILIPPINE INSULAR GOVERNMENT.

A good title can be acquired by the United States to land in the Philippine Islands required for use as military posts under either section, 1 or 2, of the act of the Philippine Commission of March 5, 1903 (No. 665), the method provided by section 1 being slightly more circuitous than that provided by section 2, in that it provides for condemnation by the Philippine insular government and subsequent transfer to the United States.

States may acquire land by condemnation for the Federal Government. Decision in the case of *Trombley v. Humphrey* (23 Mich., 472) held to be erroneous.

The Philippine government derives the power of eminent domain from section 63 of the organic act (32 Stat., 706).

DEPARTMENT OF JUSTICE,

*May 11, 1903.*

SIR: I have received your communication of the 1st instant, asking my opinion on the questions whether a good title can be obtained under the first section of the act of the Philippine Commission No. 665, dated March 5, 1903, and if not, how the expenses of proceedings under the second section of said act are to be paid.

Section 241 of act No. 190 of the Philippine Commission is as follows:

"The government of the Philippine Islands, or of any province or department thereof, or of any municipality, and any person or public or private corporation having by law the right to condemn private property for public use, shall exercise that right in the manner hereinafter prescribed."

This section is amended by the act of March 5, above referred to, as follows:

"SECTION 1. Section 241 of act numbered 190, entitled 'An act providing a code of procedure in civil actions and special proceedings in the Philippine Islands,' is hereby amended by adding at the end thereof the following words:

'The words "public use" in this section shall include the use of land in these islands for the construction and maintenance of military posts to be occupied by United States forces stationed in the Philippine Islands, and an action in the name of and on behalf of the Philippine insular government for the enforcement of the right of eminent domain for the public use thus described may be instituted under this section and the title acquired by the Philippine government in this land shall be indefeasible, and, in furtherance of the use herein described, may be by the Philippine government, in accordance with a resolution of the Philippine Commission, transferred by a duly executed deed of the Civil Governor to the United States forever.'

"SEC. 2. An action for the enforcement of the right of eminent domain on behalf of the Government of the United States may be instituted in the name of the Government of the United States upon the direction of the President of the United States or the Secretary of War, or upon the

application of the Commanding General of the United States Army, Division of the Philippines."

In the case of *Trombley v. Humphrey* (23 Mich., 472), it appeared that the State of Michigan had passed an act authorizing the condemnation of lands within the State for the purpose of conveying the same to the United States for the erection of light-houses thereon. Certain land having been thus condemned, the officers of the United States refused to accept it, on the ground that the price was unreasonable and in excess of the amount appropriated by Congress. The owner of the land thereupon brought suit against the auditor of the State for the amount of the award. In holding that the State was without authority to condemn lands for such a purpose, the court say:

"In the exercise of its sovereignty, and as a part of its provision for the regulation, control and protection of commerce, the United States erects light-houses, and may without question seize the property of individuals for the purpose, observing the constitutional requirement of making due compensation therefor. To do this would be but an ordinary exercise of the right of eminent domain. But when the State undertakes to do the same, not for any purposes of its own, but in order to turn the property over to the United States, the difficulties appear to us insurmountable.

\* \* \* \* \*

"When we look into the legislation of Congress, we discover also that the United States has never undertaken to confer upon the States authority to judge of its needs of lands for national purposes, or to assess the compensation it should pay. Any such judgment and assessment must consequently be wholly provisional, and subject to its acceptance and ratification. If in the meantime the title to land seized could vest in the State, and the State could be required to make payment therefor as is attempted by this proceeding, we reach the extraordinary result, that the State may seize and appropriate the land of an individual for the sole purpose of turning it over to the Union for its needs; while on the other hand the Union is at liberty to accept it or not at its option, and if it shall refuse, the State, whose position

in the taking was that of agent merely, without any interest whatever of its own, must, nevertheless, retain and pay for the land, while the owner, who was subject to this obligation only that he should surrender his property to the public needs, is found to have been deprived of it on a claim of necessity which the Government repels, and has no security against its being appropriated to any private purpose for which the State authorities may find it advantageous to sell it. This simple statement appears to us to demonstrate that the State can have no such power as has been attempted to be exercised in the case before us."

In the case of *Kohl v. United States* (91 U. S., 367), the Supreme Court refer with approval to the case of *Trombley v. Humphrey*, and say (p. 373): "The proper view of the right of eminent domain seems to be that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right."

This dictum of the Supreme Court is treated by the author of the opinion in *Trombley v. Humphrey* (Cooley on Constitutional Limitations, 5th ed., sec. 526, note) as settling the question whether a State can take property for the Federal Government.

While, in view of these citations, the question can not be considered as entirely free from doubt, I am of opinion that the peculiar facts and circumstances in *Trombley v. Humphrey* led to erroneous conclusions. The reasoning in that case, which was probably not very carefully considered in *Kohl v. United States* (involving an entirely different question), seems to me wholly unsatisfactory. It would, no doubt, apply as well to a proceeding under the second as under the first section of the Philippine law, if we ignore for the present the difference between the Philippines and a State. The proceeding in the Michigan case seems to have been very similar to the proceeding provided for by section 1 of the Philippine act. There was no intention in that case, I imagine, and there is none in the case of the Philippine act, section 1, to do more than furnish a conduit through which the title might pass to the Federal Government, and certainly no intention to usurp the province of

the National Government to determine what lands it might need for national purposes or the right, in spite of the Federal Government, to "assess the compensation it should pay." It was, or certainly is in the present case, expected that the proper authority of the Federal Government will determine what lands are to be taken and voluntarily ask to have their value assessed.

But Judge Cooley seems to have overlooked the principle that, after a proceeding to ascertain the value of the lands, the Government is not bound to pay the compensation, if it prefers not to do so, but may refuse to take the land. Lewis, *Eminent Domain*, 2d ed., sec. 656, and cases there cited.

There have been numerous decisions and opinions by courts and attorneys-general, to the effect that the States can take land for the Federal Government, and I think the reasons therein given are satisfactory. One of these opinions was delivered by Judge Baldwin of the Supreme Court of California and concurred in by Judge Field, afterwards associate justice of the Supreme Court of the United States. See *Gilmer v. Lime Point*, 18 Cal., 229; also *Burt v. Merchants' Ins. Co.*, 106 Mass., 356; *Matter of Petition of U. S.*, 96 N. Y., 227; *Reddall v. Bryan*, 14 Md., 444; 7 Opin., 114; 18 Opin., 352.

In addition to what is there said, attention may be called to the fact that the Constitution expressly provides for the use of the Federal forces in peculiarly local State conflicts, namely, in cases of insurrection against the State authority. As the Federal Army may at any time be thus converted into an instrument of local warfare, it would seem that the State might well make provision for forts and the like, to be used by that Army, without departing from the public purposes in which the State as such would be interested.

There is no interference by the State with the powers of the Federal Government in thus assisting and facilitating their execution at the instance of that Government, and as the use of the particular taking is within the discretion of the legislature, it would seem to be necessary to show that the taking would be manifestly of no use to the State, in order to prove that the State could not take the property.

No power of the State or of an individual would thereby be sacrificed, because the Federal Government could take the same property directly, to be applied to the same object. The States have frequently contributed to aid the Federal Government; they very commonly permit foreign corporations to condemn and hold property for purposes in which the State is interested; and while, since the adoption of the Constitution, a State might not be at liberty to permit a foreign government to do so, for foreign governmental purposes, this is not the result of any clear language of the Constitution, but for reasons which would not exclude the Federal Government, which is not foreign to the State, but a part of one complex system.

Assuming, then, that the States have the right to do what the Philippine government has undertaken to do in the Philippines, the question remains, of course, whether the Philippine government has been authorized to pass its law.

The grant of the power of eminent domain to the Philippine government by the organic act is in broad and general terms, as follows:

“Sec. 63. That the government of the Philippine Islands  
\* \* \* may acquire real estate for public uses by the exercise of the right of eminent domain.”

In the interpretation of laws organizing the Territories, it is a familiar rule to refer to the powers of the States or the organized Territories to ascertain the intent of Congress, just as it is customary to interpret the general language of Congressional statutes concerning subjects treated of by the common law by referring to the rules and definitions of the common law.

The organic act of the Philippines, in speaking of “public uses,” gives no definition of them and requires a reference to something else in order to ascertain what they are.

In the States, public uses, as we have seen, are uses in which the State is interested, without regard to whether the State itself, private individuals or corporations, or the Federal Government, is to hold the property taken. The relations of the Philippines to the Federal Government are such that the exercise of the greater part of the functions of the Federal Government is rather more than less im-



portant and interesting to the locality than is their exercise within a State. This is especially true of the military functions. So far, then, from finding a different definition of public uses in the Philippines, which would strictly exclude all uses not connected with the performance of the functions of the local government itself, it would seem that the definition familiar in the States would be especially appropriate.

I am of opinion, therefore, that a good title can be acquired by the United States under the Philippine law above quoted; that section one of that law provides for a slightly more circuitous route between the same points of departure and conclusion than is provided by section two; and that a title obtained under said first section would be valid.

Respectfully,

P. C. KNOX.

The SECRETARY OF WAR.

---

#### AUTHORITY OF CHIEF CLERK OF WAR DEPARTMENT TO SIGN REQUISITIONS.

The act of March 4, 1874 (18 Stat., 19), authorizing the Secretary of War, when temporarily absent from the Department because of illness or from other cause, to direct his chief clerk to sign requisitions on the Treasury Department, is not superseded by the act of March 5, 1890 (26 Stat., 17), which provides for an Assistant Secretary of War.

During the temporary absence from the Department of *both* the Secretary of War and his assistant, the Secretary is empowered, under the act of 1874, to authorize the chief clerk of the Department to sign requisitions, etc., that act being still in force, at least within the limited scope here stated.

DEPARTMENT OF JUSTICE,

*May 16, 1903.*

SIR: I have the honor to acknowledge the receipt of your letter of March 30, 1903, wherein you request my opinion as to whether the act of March 4, 1874, entitled, "An act authorizing the chief clerk of the War Department to sign requisitions on the Treasury during the temporary absence of the Secretary of War" (18 Stat., 19), has been entirely superseded by the act of March 5, 1890, entitled, "An act providing for an Assistant Secretary of War" (26 Stat., 17),

or whether the first-named act is not still in force, as understood by your Department, within the limited scope referred to in your letter, viz, during the temporary absence of both the Secretary and the Assistant Secretary of War.

Accompanying your letter is a copy of a decision by the Comptroller of the Treasury, of February 27, 1903, in which the question is raised as to whether said act of 1874 has been operative since the approval of the act of March 5, 1890, providing for an Assistant Secretary of War; and after quoting the note appearing on page 112, of volume I, of the Compiled Statutes of 1901, the Comptroller says:

“There appears to be considerable force in the view of the compiler. If the act has been in force since the approval of the act of March 5, 1890, providing for an Assistant Secretary of War, it presents the anomalous condition of a chief clerk being vested with certain powers of the head of a Department, with the right to exercise them although an authorized assistant head of the Department is present, with full power to act under the assignment and direction of the head of the Department. This result would necessarily follow if the act of 1874 did not become obsolete upon the approval of the act creating an Assistant Secretary of War, unless we can read into the act of 1874 the restriction that he can not exercise the powers with which he is therein vested unless the Assistant Secretary is also absent. I know of no rule of law which authorizes such a construction of the act of 1874, but for the last thirteen years it has been held by the War Department to be an operative act, and I do not feel justified in reversing this practical construction in the absence of an opinion by the Attorney-General or a decision by the courts to the contrary. I would suggest that the opinion of the Attorney-General be taken upon this point.”

I am unable to see any force in the suggestion of the Comptroller that an “anomalous condition is presented of having a chief clerk vested with certain powers of the head of a Department, with the right to exercise them, although an authorized assistant head of the Department is present, with full power to act under the assignment and direction of the head of the Department.” No such condition is pre-

sented in the statement of facts submitted in your letter, for it appears that it has been the universal practice of your Department to authorize the chief clerk of your Department to perform such duties only in case the Secretary and Assistant Secretary are absent from the Department.

The act of Congress of March 4, 1874 (18 Stat., 19), provides as follows: "That when, from illness or other cause, the Secretary of War is temporarily absent from the War Department, he may authorize the chief clerk of the Department to sign requisitions upon the Treasury Department, and other papers requiring the signature of said Secretary; the same, when signed by the chief clerk during such temporary absence, to be of the same force and effect as if signed by the Secretary of War himself."

It is to be observed, that by the terms of this act it is provided that the Secretary of War, when he is temporarily absent from the War Department, from illness or other cause, *may* authorize the chief clerk of the Department to sign requisitions upon the Treasury Department, etc. The language of that act is not, therefore, mandatory, but leaves it to the discretion of the Secretary of War as to when he may authorize the chief clerk of the Department to sign requisitions and other papers. The Secretary is not *required*, during his temporary absence on account of illness or other cause, to designate the chief clerk of the Department to act for him.

By section 177, Revised Statutes, it is provided as follows: "In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease."

This act was passed July 23, 1868, and is general in its application to all departments of the Government. At the time of the passage of that act, the law did not make provision for a "first or sole assistant" Secretary of War.

It is now suggested, by the compiler of the United States Compiled Statutes for 1901, that the act of March 5, 1890, entitled "An act providing for an Assistant Secretary of

War" has in effect superseded and repealed the act of March 4, 1874, and the Comptroller of the Treasury, in that portion of his opinion above quoted, seems to incline to the same view.

The act of March 5, 1890 (26 Stat., 17), is as follows: "That there shall be in the Department of War an Assistant Secretary of War, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of four thousand five hundred dollars a year, payable monthly, and who shall *perform such duties in the Department of War as shall be prescribed by the Secretary, or may be required by law.*"

In order that any force may be given to the suggestion of the compiler that the act of Congress of 1890, creating the office of Assistant Secretary of War, has superseded the act of 1874, above referred to, it would be necessary to hold that the last-mentioned act has been repealed by implication. Such repeals are not favored by the courts, unless it be manifest that the legislature so intended. All laws are presumed to have been passed with deliberation, and with full knowledge of all existing laws on the subject. It is but reasonable to conclude that in framing a particular statute the law-making power did not intend to modify or abrogate any existing law relating to the same subject, unless there be a repugnancy between the two laws which is irreconcilable, or unless the later act fully embraces the subject-matter of the earlier act, or unless the reason for the earlier act has been absolutely removed. The later act may be, and, indeed, often is, merely cumulative or *auxiliary*.

Nor can it be said that the case here under discussion falls within that class of cases which hold that where the object and reason for which the statute was passed has been removed by a later enactment, that in such case there is an implied repeal of the former statute. The evident object and purpose of the act of 1874 was to provide means by which the ordinary departmental business could be conducted during the temporary absence of the Secretary, and the reason for the existence of the law remained unimpaired after the passage of the act of 1890, providing for an Assistant Secretary of War, though perhaps somewhat limited as

to the frequency of the occasions when it would be resorted to by the Secretary.

It is, of course, true that the Assistant Secretary of War is required by section 177, Revised Statutes, above quoted, to perform the duties of the Secretary in the case of death, resignation, absence, or sickness, but it seems to me clear that Congress must have recognized, in omitting to expressly repeal the act of March 4, 1874, that occasions would frequently arise when both the Secretary of War and the Assistant Secretary of War would be temporarily absent from the Department during the same time, and that in such cases, at least, the provisions of the act of March 4, 1874, would be just as necessary to the proper administration of the work of the Department as though no Assistant Secretary of War had been provided. In other words, the mere creation of the office of Assistant Secretary of War, thereby providing an official authorized under the law to perform the duties of the Secretary of War during his temporary absence, can not, in my judgment, be construed as superseding or repealing by implication such an express provision of law as is contained in the act of March 4, 1874.

It is, therefore, altogether unnecessary for me to consider the anomalous condition suggested by the Comptroller of the Treasury "of a chief clerk being vested with certain powers of the head of a department, with the right to exercise them, although an authorized assistant head of the department is present, with full power to act under the assignment and direction of the head of the department." Suffice it to say that no such "anomalous condition" is herein presented, nor is any such construction of the law sought to be applied.

It has been the uniform practice of your Department, ever since the passage of the act of March 5, 1890, to authorize the chief clerk of your Department to sign requisitions, etc., under the act of March 4, 1874, at only such times as both you and the Assistant Secretary of War may be temporarily absent from the Department. Nor does it appear probable that an occasion is likely to arise in the future when the Secretary of War would assume to confer such authority upon the chief clerk of the Department at a time when the Assistant Secretary of War is also present and ready to act.

I am therefore of the opinion that during the temporary absence from the Department of both the Secretary of War and the Assistant Secretary of War, the Secretary is empowered, under the act of March 4, 1874, to authorize the chief clerk of the Department to sign requisitions, etc., as provided for by said act; and that said act is still in force within, at least, the limited scope herein considered, and as understood by your Department.

Respectfully,

P. C. KNOX.

THE SECRETARY OF WAR.

---

INDUCTION OF STATE MILITIA INTO THE MILITARY SERVICE  
OF THE UNITED STATES.

Certain members of the Sixth Massachusetts Militia which was called into the service of the United States by proclamation of the President of April 15, 1861, who failed to reach Washington, the place of rendezvous, were never inducted into the actual military service of the United States under that call, a formal muster-in being necessary.

The question as to whether a constructive muster-in of militia might not have, in some instances, the same effect as a formal muster-in of militia under a call by the President, not considered.

DEPARTMENT OF JUSTICE,

May 27, 1903.

SIR: I have the honor to reply to your letter of December 30, 1902, wherein you request my opinion as to "what is necessary to induct State militia into the military service of the United States under a call by the President."

It appears from your communication that your Department has under consideration a case in which it is necessary to decide whether the histories of certain members of the Sixth Massachusetts Militia shall or shall not be included in the official compilation of the military histories of all officers and enlisted men who have been *in the military service of the United States as volunteers or militia*. You state that the case of the Sixth Massachusetts is fairly representative of the class to which it belongs, and that a decision of the question of law involved will, it is believed, dispose of all similar questions that are likely to arise in this class of cases in the future.

The facts in the case of the Sixth Massachusetts Militia, as the same are set forth on page 3, et seq., of the pamphlet accompanying your letter, containing a very able and exhaustive opinion upon this same question by F. C. Ainsworth, Brigadier-General, U. S. Army, Chief, Record and Pension Office, are substantially as follows:

On April 15, 1861, the President issued his proclamation calling forth the militia of the several States to the number of 75,000, under authority of the act of Congress of February 28, 1795. On the same day the governor of Massachusetts was requested by the War Department to cause to be detached from the militia of that State two regiments, to consist of 74 officers and 1,486 enlisted men, and the governor was requested to advise the War Department as to the time the State's quota might be expected at the rendezvous, where it would be met as soon as practicable by an officer or officers "to muster it into the service and pay of the United States." At the same time the governor was advised by the War Department that at the time of the muster the oath of fidelity to the United States would be administered to every officer and man, and that the mustering officer would be instructed to receive no man, under the rank of commissioned officer, who was apparently over 45 or under 18 years of age, or who was not "in physical strength and vigor." On the same day, April 15, 1861, officers of the Army were detailed by the War Department to muster into the service of the United States the militia of a majority of the several States upon which requisitions had been made, at designated rendezvous within the State limits. In the circular letter sent by the War Department to the governors of the various States on April 15, 1861, Boston was designated as the rendezvous for the Massachusetts militia, but on the same day the governor was instructed by a telegram from the War Department to send his companies to Washington by rail. On April 16, 1861, the governor was advised by the War Department, "we will muster your regiments after arrival." On the 17th of April the Sixth Massachusetts Militia left Boston for Washington, under instructions from Governor Andrew. On said date the regiment had not been mustered into the service of the

United States, and it was clearly understood both by the State and the United States authorities that it would be mustered in upon its arrival in Washington. In Special Order, No. 22 (Report of the Adjutant-General of Massachusetts, 1861, p. 9), it is stated that "said troops (the Sixth Massachusetts Regiment) are to enter into the service of the United States as militia, and there (at Washington) await and obey such further orders as may be received." And in the same order, the Third Regiment was directed to proceed to Fortress Monroe, Va., and "there to enter into the service of the United States."

The Sixth Massachusetts Regiment arrived in Baltimore on the 19th day of April, 1861, en route to Washington, and was there attacked by a mob, and four of its members were killed and a number wounded. On the 22d day of April, after its arrival in Washington, the regiment was mustered into the military service of the United States for a period of three months from the date of muster in, and the regiment was not mustered out of service until August 2, 1861, more than three months after the date of its muster in.

Besides the four members of the regiment who were killed in Baltimore, six members of said regiment were wounded in the Baltimore riot, and did not rejoin the regiment, and were not mustered into the service with it or at any subsequent date. Nineteen other members of said regiment, none of whom were reported as having been injured in the riot, returned to their homes from Baltimore, and were not mustered into the United States service.

It appears further that Daniel B. Tyler, a corporal of Company D, Sixth Massachusetts Militia, accompanied his regiment to Baltimore, and was there injured in the riot of April 19, 1861. He probably went home; at any rate, he was not mustered into the service of the United States with his company at Washington, and on the muster rolls of his company appears his name, with the remark, "Not mustered; left at Baltimore." He never rejoined his regiment, nor was he mustered into the service of the United States as a member of the Sixth Massachusetts, and was never paid by the United States as a member of it, nor was he ever discharged by any representative of the United States



from said regiment. It does appear, however, that he enlisted on September 20, 1861, in Company M, First Massachusetts Cavalry, and was mustered into the service of the United States with that organization. There is nothing in the records of the War Department to show whether the twenty-five men who left the regiment at Baltimore and went home were specifically authorized so to do, but it is evident that if any such authority was given, it was given by the State officers with the definite understanding that the men were not yet subject to the orders of the officers of the United States.

The question, therefore, which arises from the foregoing statement of facts is, whether any of these members of the Sixth Massachusetts Militia as such were in fact ever inducted into the military service of the United States under a call by the President. It is immaterial to consider whether these twenty-five men who left the Sixth Massachusetts Militia at Baltimore ever afterwards, as individuals or as members of some other military organization, entered the military service of the United States.

Paragraph 16, section 8, article 1, of the Constitution confers upon Congress the power "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." \* \* \*

Under this provision of the Constitution, Congress early in our history enacted various laws providing for organizing, arming, and disciplining the militia of the several States.

Paragraph 15, section 8, article 1, of the Constitution confers upon Congress the power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."

Under this provision of the Constitution, Congress passed the act of February 28, 1795, conferring such power on the President, which act is as follows:

"SEC. 1642. Whenever the United States are invaded, or are in imminent danger of invasion from any foreign nation or Indian tribe, or of rebellion against the authority of the Government of the United States, it shall be lawful for the

President to call forth such number of the militia of the State or States, most convenient to the place of danger, or scene of action, as he may deem necessary to repel such invasion, or to suppress such rebellion, and to issue his orders for that purpose to such officers of the militia as he may think proper."

It was under the authority contained in the above section that President Lincoln issued his proclamation of April 15, 1861, calling forth the militia of the several States to the number of 75,000.

The first question, therefore, which arises for consideration is whether such proclamation had the effect of instantly changing the status of the militia so called forth, so that from that time they should be considered as having been inducted into the military service of the United States under a call by the President.

It will be admitted that prior to such call the militia of the several States were not in the military service of the United States. Did the call of the President, therefore, when communicated to the militia, *ex proprio vigore*, operate to induct such militia into the military service of the United States?

It is true that the United States, under various acts of Congress from the very earliest times, assumed, under the provisions of the Constitution above quoted, to exercise certain powers of control over the militia of the several States when not "in the actual service of the United States" in the matter of organizing, arming, and disciplining the same. (See sections 1625 to 1641, inclusive, Revised Statutes.)

And it is likewise true that Congress early in our history enacted various laws relating to the militia "when called into the actual service of the United States," the apparent purpose of such laws being to assume certain control over the militia after the requisition of the President should be made, and during the various stages preliminary to the time when such militia should be actually received into the service of the United States, and also to provide for the absolute control of such militia after they were received into the service of the United States until properly discharged therefrom.

Section 1642, Revised Statutes, above quoted, authorizes the President to call forth the militia of the several States to repel invasion, or to suppress rebellion, and section 1644 provides that the militia "when called into the actual service of the United States" for the suppression of rebellion against and resistance to the laws of the United States, such militia shall be subject to the same rules and regulations of war as are the regular troops of the United States; section 1649 provides for the punishment of any officer or private of the militia who shall fail to obey the orders of the President when he calls out the militia into the actual service of the United States; section 1650 provides that the militia "when called into the actual service of the United States" shall, during their term of service, be entitled to the same pay, rations, clothing, and camp equipage as may be provided by law for the Army of the United States; section 1651 provides that when the militia is called into the actual service of the United States their pay shall be deemed to commence from the date of their appearing at the places of the battalion, regimental, or brigade rendezvous; section 1652 provides that such militia shall be entitled to certain traveling allowances from their places of residence to the place of general rendezvous, and from the place of discharge back to their residence.

But all of these various provisions of the law, when considered together, clearly indicate that the militia, when called forth by the President, are not to be considered *eo instanti* in the actual military service of the United States, for it is apparent that a great many members of the militia might fail or refuse to obey the call of the President, and while laws are provided for their punishment in case of such failure or refusal, it is very evident that some affirmative act or acts on their part was considered by Congress as necessary to bring them into the actual military service of the United States. As Judge Washington said, in delivering the opinion of the court in *Houston v. Moore* (5 Wheat., 1, 20), "that it would seem to border on absurdity to say that a militiaman was in the service which he had refused to enter."

I may, therefore, pass in this discussion to the consideration of the next preliminary step, which naturally involves the question as to whether after a call by the President has been made, the militiamen can by any act or acts of their own, independently of further action on the part of the United States authorities, induct themselves, so to speak, into the military service of the United States. After the call has been made and communicated to the militiaman by the President, the first possible act on the part of the militiaman is to determine in his own mind as to whether he is willing to enter the military service of the United States. Such an act is necessarily psychological in its character, and it will not be contended that because the militiaman makes up his mind to enter the service of the United States under such call, that he thereupon enters, *ipso facto*, into the military service of the United States.

But should he go further and appear at the place of rendezvous, with the intention of entering the military service of the United States, would such an act be sufficient to induct him into the military service of the United States? I think not. After the militiaman has concluded to obey the call of the President, there are still many affirmative acts which he must perform before he can be regarded as in the actual military service of the United States. Such as, for example, preparation, departure from home, traveling and marching to the place of rendezvous, his arrival at the place of rendezvous, presenting himself for examination and inspection to the proper mustering officers of the Government, and, finally, if he be accepted, by taking the oath required by the rules and regulations of the War Department. The question, therefore, very naturally is, "At what point does the transition take place, and the militiaman change his character from State to national militia?"

In the case of *Houston v. Moore* (5 Wheat., 1), it was decided that none of these preliminary acts on the part of the militiaman, *prior to his arrival at the place of rendezvous*, had the effect of placing him in the actual military service of the United States. In that case it was unnecessary for the court to go farther, and it may be that in the case of the

Sixth Massachusetts, now under consideration, it is unnecessary for me to go beyond that point, since it appears from the statement of facts submitted as the basis of this opinion that the twenty-five members of the Sixth Massachusetts never arrived at the place of rendezvous, and were never mustered into the actual military service of the United States. But in view of the character of the work in which your Department is at present engaged, I am inclined to permit this opinion to take a somewhat wider range. As just observed, we have no less an authority than a decision of the Supreme Court of the United States to the effect that the preparation of the militiaman, his leaving home, and marching toward the place of rendezvous under a requisition by the President, do not operate in themselves to place him in the actual military service of the United States.

The question, then, to be considered is, *whether his arrival at the place of rendezvous has such effect.* It was intimated by Mr. Justice Washington, in *Houston v. Moore*, supra, that it does. His language is as follows (p. 20): "From this brief summary of the laws, it would seem that *actual service* was considered by Congress as the criterion of national militia, and that the service did not commence until the arrival of the militia at the place of rendezvous; that is, the *terminus a quo* the service, the pay, and subjection to the Articles of War are to commence and continue."

But this language of the court was clearly obiter. *Houston* was a private enrolled in the Pennsylvania militia, and belonged to the detachment of the militia which was ordered out by the Governor of that State in pursuance of a requisition from the President of the United States, dated July 4, 1814. Being duly notified and called upon, he neglected to march with the detachment to the appointed place of rendezvous. For this delinquency he was tried before a court-martial summoned under the authority of the executive of the State. The language above quoted was used by Mr. Justice Washington in discussing the status of a militiaman after his arrival at the place of rendezvous *on the assumption that such militiaman thereafter actually entered the military service of the United States.*

The arrival at the place of rendezvous would have a very different signification in law when considered from the standpoint of a militiaman who should take all the necessary steps leading up to a muster-in, and thereupon should be, in fact, actually accepted by the Government and mustered into the service, and a militiaman who should take all of the preliminary steps leading up to a muster-in, and at that point should refuse to be mustered in, or should be rejected by the mustering officers of the Government. In the case of the former the law regards his arrival at the place of rendezvous as perhaps the *terminus a quo*, and makes provision that his pay "shall be *deemed* to commence from the date of his appearing at the place of \* \* \* rendezvous." While in the case of the latter, though the law requires the militiaman to take all the preliminary steps as to preparation and appearance at the place of rendezvous, and even to submitting his person to an inspection and examination by the proper mustering officers, nevertheless the law contemplates that if at that point the militiaman should refuse to be mustered in, or should desert, or should suddenly die, or in case of his rejection by the United States, he should in no sense be considered as having been inducted into the actual military service of the United States.

It is, I think, apparent from this discussion that there must be some particular act or point of time when the transition may be considered by both parties as having been effected, and in my opinion it will not do to regard the appearance of the militiaman at the place of rendezvous as the consummation of such transition. Some formal acceptance or its equivalent by the Government or its authorized officers must be regarded as absolutely necessary under the law in order that such transition may be brought about.

Mr. Justice Washington in the case of *Houston v. Moore*, supra, recognized the difficulty which we are here considering when he said (p. 17):

"That Congress might by law have fixed the period by confining it to the draft, the order given to the chief magistrate or other militia officer of the State, to the arrival of the men at the place of rendezvous, or to any other circumstances, I can entertain no doubt. \* \* \*

“But, although Congress has been less explicit on this subject than they might have been, and it could be wished they had been, I am, nevertheless, of opinion that a fair construction of the different militia laws of the United States will lead to a conclusion that something more than organizing and equipping a detachment and ordering it into service was considered as necessary to place the militia in the service of the United States.”

But, fortunately, we are not compelled to resort to mere speculation in order to ascertain the exact time when such transition is effected. The Rules and Regulations of the Department of War within their proper sphere, when approved by the President, have the full force of law, and judicial notice of them will be taken by the courts. At the very time of the decision of the case of *Houston v. Moore*, the following regulation of the War Department was in full force and effect:

“3. So soon as one hundred privates, eight non-commissioned and five commissioned officers (of militia) shall have been organized as a company under any requisition as aforesaid, *they will be mustered, inspected, and received* into the service of the United States, and upon the rolls and reports made in consequence thereof they will be entitled to pay, etc.” (War Department General Orders of March 19, 1813.)

Similar provisions are found in the Regulations of the War Department of 1814, 1834, 1835, 1841, 1847, and 1857, and at the very time, to wit, April 22, 1861, that the Sixth Massachusetts Regiment was mustered into the service of the United States at Washington, the following Regulation of the War Department was in full force and effect, having the force of law:

“1580. *Before militia are received in the service of the United States, they shall be mustered* by an inspector-general, or some other officer of the Regular Army, specially designated to muster them.”

My conclusion is, therefore, that if the laws of Congress relating to State militia have left any doubt as to the exact time when State militia called forth by the President enter into the military service of the United States, and change

their character from State to national militia, as was intimated by the court in *Houston v. Moore*, that the Rules and Regulations of the Department of War, above quoted, must be considered as having removed such doubt, and as having definitely fixed the time when such State militia enter the military service of the United States, *at the date of muster-in.*

And the uniform practice of the War Department, covering a period of more than half a century, has been to regard such militia as not in the actual military service of the United States until the date of muster in, and such practice, in my judgment, is amply supported by the decisions of the Supreme Court, and by the opinions of the Attorneys-General. *Houston v. Moore*, 5 Wheat., 1; *Martin v. Mott*, 12 Wheat., 19; Story on the Constitution, sec. 1213; 3 Opin., 530, 691; 10 Opin., 100; 16 Opin., 150, 152; 21 Opin., 130; 23 Opin., 406.

The purpose of the law, thus supplemented by the Rules and Regulations of the War Department requiring a formal muster-in, becomes at once apparent. For, it is evident that those who are physically and mentally incapacitated for military duty should never be received into the military service of the United States, and the question of the fitness or unfitness of a militiaman, reporting under a call, can only be determined at the inspection which is required to be made as a preliminary to muster-in, the purpose of the law being to prevent the acceptance into the military service of the United States of officers and men unfit for that service. To hold that the mere act of reporting at a rendezvous, and submitting to an inspection and examination by the mustering-in officers, is sufficient to induct a militiaman into the service of the United States, is to hold, also, that the United States has no voice or power of selection in the matter, but is compelled to accept all who may report under a call, without regard to their competency and fitness for service. That the War Department has never assented to any such construction of the law is manifest from the regulations above quoted, and that the decisions of the Supreme Court and the opinions of the Attorneys-General



do not justify any such interpretation of the law is very clear when we consider the authorities hereinbefore referred to.

In concluding this discussion it is worthy of note that if, under the law, Tyler and his twenty-four associates should be regarded as having been in the military service of the United States as members of the Sixth Massachusetts Militia prior to the arrival of that regiment at Washington, it would be not only a serious misfortune to them, but also to hundreds of other militiamen whose military records are substantially the same. For if these men were in the actual military service of the United States when they left their regiment at Baltimore on April 19, 1861, en route to Washington, they must be regarded as deserters from that service, they having permanently withdrawn themselves from it without a discharge, and without permission from any officer of the United States Army.

Brigadier-General Ainsworth, in the pamphlet above referred to, suggests that the formality of muster-in under certain circumstances might be waived by the United States, or its properly constituted officers; or, in other words, that a constructive muster-in might have, in some instances, the same effect as a formal muster-in of militia under a call by the President. I feel that this suggestion should not be passed over without some word of explanation.

In your communication you state "that the case of the Sixth Massachusetts Militia is fairly representative of the class to which it belongs, and it is believed that an authoritative decision of the question of law involved in it will dispose of all similar questions that are likely to arise in this class of cases in future." It is to be observed that the statement of facts in the case of the Sixth Massachusetts Militia does not present any facts upon which an opinion could properly be predicated as to whether a constructive muster-in might not, under certain circumstances, have the same effect as a formal muster-in of militia. I therefore have deemed it inadvisable to consider such questions in this opinion, in conformity with the long-established rule of this Department. But in so declining to express an

opinion, I do not wish to be understood as intimating that a formal muster-in may not in certain cases be waived by the Government.

My opinion, therefore, is, that the twenty-five members of the Sixth Massachusetts Militia, none of whom ever reached Washington, the place of rendezvous, were never inducted into the actual military service of the United States under a call by the President, and that under the law as it existed at that time, and as applied to the facts relative to said regiment, a formal muster-in was necessary to induct said militia into the military service of the United States.

Respectfully,

P. C. KNOX.

The SECRETARY OF WAR.

---

AMERICAN EPHEMERIS AND NAUTICAL ALMANAC—  
AMERICAN NAUTICAL ALMANAC.

The Secretary of the Navy is authorized, under existing law, to cause to be printed 2,500 copies of the American Ephemeris and Nautical Almanac, and 3,182 copies of "the papers supplementary thereto;" and of the American Nautical Almanac, such "additional" copies thereof as he may deem necessary "for the public service and for sale to navigators and others."

DEPARTMENT OF JUSTICE,

*June 8, 1903.*

SIR: In your letter of March 14, 1903, you call attention to sections 54 and 73 of the act of January 12, 1895 (28 Stat., 608, 612), the joint resolution of May 13, 1902 (32 Stat., 740), and the act of July 1, 1902 (32 Stat., 678), and request my opinion "as to how many copies of each edition of the American Ephemeris, of the papers supplementary thereto, and of the Nautical Almanac are authorized by existing law to be printed."

It appears that, of its publications, the Navy Department has, for many years, published two books referred to in your note: One, and the larger, bound in cloth, called "The American Ephemeris and Nautical Almanac," and the other, bound in paper, called "The American Nautical Almanac." The former is intended chiefly for the Navy, and for sale or

free distribution to observatories, astronomers, colleges, libraries, etc., and of which the Department disposes annually about 1,000 copies. The other contains in a condensed form much of that which is in the former, and is intended chiefly for the use of navigation, and is adapted to the meridian of Greenwich, of which the Department disposes annually about 2,300 copies.

Your Department publishes also what, in your note and in the acts referred to, are called "the papers supplementary thereto," that is, supplementary to the one first above referred to; and I am asked how many copies of each of the three are now authorized to be printed.

By section 54 of the act of January 12, 1895 (28 Stat., 608), it is provided—

"Whenever any document or report shall be ordered printed by Congress, such order to print shall signify the 'usual number' of copies for binding and distribution.

\* \* \* No greater number shall be printed unless ordered by either House, or as hereinafter provided. When a special number of a document or report is ordered printed, the *usual number* shall also be printed unless already ordered. The *usual number* of documents and reports shall be one thousand six hundred and eighty-two copies."

Under this section, a general order to print a document or report, not stating the number of copies, authorizes the printing of the "usual number" of 1,682 copies. Where Congress directs the printing of a stated number of copies, this carries with it the order to print the "usual number," or 1,682 copies in addition, unless the "usual number" has been already ordered.

Section 73 of the same act provides that—

"Extra copies of documents and reports shall be printed promptly when the same shall be ready for publication, \* \* \* and shall be of the number following in addition to the *usual number*.

"Of the Ephemeris and Nautical Almanac and of the papers supplementary thereto, one thousand five hundred copies."

Except as the Secretary is, by this section, further authorized to have additional copies of the Ephemeris and of the

Nautical Almanacs extracted therefrom, printed for the public service and for sale to navigators and others, this fixes the number of the Ephemeris and Nautical Almanac and supplementary papers at 1,500 copies each, in addition to the *usual number* of 1,682, a total of 3,182.

By the joint resolution of May 13, 1902 (32 Stat., 740), it is provided—

“That hereafter the ‘usual number’ of copies of the American Ephemeris and Nautical Almanac shall not be printed. In lieu thereof there shall be printed and bound one thousand one hundred copies of the same.”

Then follows the act of July 1, 1902 (32 Stat., 678), in these words:

“Hereafter there shall be published of the American Ephemeris and Nautical Almanac two thousand five hundred copies, five hundred of which shall be for the use of the Senate, one thousand for the use of the House of Representatives, and one thousand for distribution or sale by the Navy Department.”

But these last two provisions refer only to the American Ephemeris and Nautical Almanac, and do not fix the number of copies to be printed of either the American Nautical Almanac or “the papers supplementary thereto,” but as to these leave the number unchanged.

I am of the opinion that these latter provisions annulled that portion of section 73 of the act of January 12, 1895, which gave to the Secretary of the Navy authority to cause to be printed *additional* copies of the Ephemeris and Nautical Almanac for the public service and for sale to navigators and others. The *additional* copies there mentioned were copies in addition to the 1,500 *extra* copies provided for in that section. Neither does the act of July 1, 1902, revive the provision for printing the “usual number” of copies, abrogated by the resolution of May 13, 1902.

I am, therefore, of the opinion that the law now authorizes the printing of 2,500 copies of the Ephemeris and Nautical Almanac, and no more.

As to the American Nautical Almanac and as to “the papers supplementary thereto,” the case is different. As neither the joint resolution of May 13, 1902, nor the act of

July 1, 1902, refers to either of these, they leave as to them the law as it stood under the act of 1895. And although these later acts, by making specific provisions fixing the number of copies to be printed of the American Ephemeris and Nautical Almanac, have, as already said, abrogated the authority given by section 73 of the act of 1895 to the Secretary, to cause to be printed additional copies of the American Ephemeris and Nautical Almanac, they have not done so as to the American Nautical Almanac, for they do not refer to that work.

I am of opinion, therefore, that the Secretary of the Navy may still cause to have printed *additional* copies of the American Nautical Almanac, under section 73 of the act of 1895, and as there provided, but this authority did not and does not authorize additional copies of the papers supplementary to the Ephemeris and Nautical Almanac.

No recent act appears to have made specific provision as to the number of copies of the American Nautical Almanac that are to be printed. For a long time heretofore, and with the tacit assent of Congress, this number has been determined by the Secretary of the Navy under the authority given him by section 73 of the act of 1895 to "cause additional copies of \* \* \* the Nautical Almanac extracted therefrom to be printed for the public service and for sale to navigators and others." As this provision as to the American Nautical Almanac has not been abrogated, I see no objection to the continuance of this practice, to meet the needs of the Department, until Congress shall otherwise provide in relation thereto.

As to what are called "the papers supplementary thereto," section 73 of the act of 1895 fixes the number at 1,500. As the legislation of 1902 does not refer to those papers, it does not change this number, nor, as to them, abrogate the provision requiring the usual number, or 1,682 copies. Therefore this last number is to be added, making a total of 3,182. Congress may not have intended to provide for a greater number of the less important and less used documents, but its language so expresses and must be so taken.

Respectfully,

P. C. KNOX.

THE SECRETARY OF THE NAVY.

NATIONAL BUREAU OF STANDARDS—SERVICES TO STATE INSTITUTIONS.

Under section 8 of the Act of March 3, 1901 (31 Stat., 1449), each State may properly demand and receive from the National Bureau of Standards all comparisons, calibrations, tests, or investigations, free of charge, which are necessary or essential for a State government in performing its lawful functions.

State institutions may also call upon and receive from that Bureau, free of charge, such services, specified in section 8 of the above named act, as State governments would be entitled to have performed.

The Secretary of the Treasury is authorized, under sections 3 and 9 of said act, to provide by regulation what officer or officers of "State governments" shall be recognized by the Bureau in requests made upon it for the services specified in that act.

DEPARTMENT OF JUSTICE,

*June 9, 1903.*

SIR: I have the honor to reply to your letter of February 28, 1903, wherein you request my opinion upon the proper interpretation of the words "State governments" as the same appear in section 8, of the act entitled "An act to establish the National Bureau of Standards," approved March 3, 1901 (31 Stat., 1449).

You state that the question of "free testing" arises in connection with recent requests which have been received by the National Bureau of Standards for the verification of weights and measures from "quasi State institutions," such as State universities, agricultural colleges, State surveyors, State food commissions, State boards of health, and State normal schools, and the specific questions presented for my consideration are:

1. "What construction should be put upon the term 'State governments' within the meaning of this act, in view of the purposes of the establishment of the National Bureau of Standards?"

2. "What State officer or officers should be recognized as having authority to call for the services of the National Bureau of Standards without charge?"

In your letter you further state "that inasmuch as the Bureau was established in order that the standards used by the Government might be verified, on this basis it was

believed that the term "State governments" within the meaning of this act, covers simply the department having the custody of the State standards, or the officer commonly known as the State sealer of weights and measures, and that the verifications intended to be performed without charge were understood to be the comparison of State standards, such standards having been originally furnished by the National Government."

It is my opinion that the law under consideration is not susceptible of any such narrow and restricted interpretation.

By the resolution of Congress of June 14, 1836 (5 Stat., 133), it is provided that the Secretary of the Treasury be "directed to cause a complete set of all the weights and measures adopted as standards, and now either made or in the progress of manufacture for the use of the several custom-houses, and for other purposes, to be delivered to the governor of each State in the Union, or such person as he may appoint, for the use of the States respectively, to the end that an uniform standard of weights and measures may be established throughout the United States."

And by joint resolution of March 3, 1881 (21 Stat., 521), it was provided that the Secretary of the Treasury should deliver a complete set of all weights and measures adopted as standards to the governor of each State in the Union, for the use of agricultural colleges in the States, respectively, which have received a grant of lands from the United States.

By the act of July 11, 1890 (26 Stat., 242), it was provided, that hereafter such necessary "repairs and adjustments" shall be made to the standards furnished to the several States and Territories as may be requested by the governors thereof, and also to standard weights and measures that have been, or may hereafter be, supplied to the United States custom-houses, and other officers of the United States, under act of Congress, when requested by the Secretary of the Treasury.

Section 8 of the act of March 3, 1901, is as follows:

"That for all comparisons, calibrations, tests, or investigations, except those performed for the Government of the United States or State governments within the United States, a reasonable fee shall be charged, according to a

schedule submitted by the director and approved by the Secretary of the Treasury."

If, as is now suggested by you, section 8 of the act of March 3, 1901, above quoted, was intended simply to cover those departments of the State governments having the custody and control of State standards originally furnished by the United States Government, and the verifications contemplated by said act to be performed for State governments without charge should be understood to be simply the comparisons of such State standards, it would be difficult to see any real necessity for the provision relative to "State governments" which we find in section 8 of the act of March 3, 1901. The act of July 11, 1890, was in full force and effect at the time of the passage of the act of March 3, 1901, and by its express terms the several States, upon a request from the governor, were entitled to have "all necessary repairs and adjustments" made, free of charge, to standards which had been furnished to them by the Government. The phrase "repairs and adjustments" in the law of 1890 would seem to be sufficiently comprehensive to cover all such comparisons and verifications as it is now suggested the State governments are only entitled to receive under a restricted interpretation of the act of March 3, 1901. I am, therefore, inclined to the opinion that many other and additional services were contemplated in the act of March 3, 1901, than the mere comparison and verification of those standards which had theretofore been furnished to the several States by the National Government.

And an additional reason for this conclusion becomes at once apparent upon an examination of the language of the various acts of Congress relative to this same subject. Prior to the passage of the act of March 3, 1901, every act of Congress relating to a uniform standard of weights and measures throughout the United States contained the phrase, "standards furnished to the several States and Territories," or language of similar import, showing very clearly that Congress had in mind only such standards as had theretofore been furnished by the General Government to the several States. But the language of the act now under consideration does not contain any such phrase, and



should not, therefore, be considered as restricting the services to be performed by the National Bureau of Standards for the State governments to the standards furnished to the several States. The language of section 8 of the act of March 3, 1901, is "that for all comparisons, calibrations, tests, or investigations, except those performed for the Government of the United States or *State governments* within the United States, a reasonable fee shall be charged," etc.

From all these considerations, as well as from the general purpose and scope of the act of March 3, 1901, I feel no hesitancy in asserting that Congress intended that the various State governments should not be limited in the services which they might require from the National Bureau of Standards to mere comparisons and verifications of the standard weights and measures heretofore furnished them by the National Government, but that each State may properly demand and receive from the National Bureau of Standards all comparisons, calibrations, tests or investigations, free of charge, which are necessary and essential for a State government in performing the various functions contemplated by its constitution and laws.

What construction, then, should be given the term "*State governments*" within the meaning of this act, and in view of the purpose of the establishment of the National Bureau of Standards?

The law here under discussion apparently places "*State governments*" on an equality with the "*Government of the United States*," so far as each may be entitled to the services of the National Bureau of Standards free of charge. A proper understanding of the phrase "*Government of the United States*" may, therefore, be of some assistance in arriving at a proper interpretation of the phrase "*State governments*."

It would seem, upon a moment's reflection, that all the various branches of the Government—departments, bureaus, and institutions which are supported or under the direct control and supervision of the United States, are sufficiently connected with, and in such a sense a part of the Government of the United States, as to be entitled to the services contemplated by said act of Congress free of charge. Nor

do I believe that the proposition would be seriously controverted that a United States military academy, or a United States penitentiary, for example, while, properly speaking, not the United States Government, are nevertheless, within the meaning of the Federal laws, such a part of the United States Government as would entitle them to the services of the National Bureau of Standards free of charge. Such institutions perform more or less well-defined and well-recognized functions of national government, and are in a sense apart of that government, and it is manifest that the cost of any services which such institutions might require from the Bureau of National Standards in the proper discharge of the various purposes for which they were established by law, would eventually be borne and paid by the National Government. By a parity of reasoning, the various State governments are entitled to the same benefits, privileges, and services from the National Bureau of Standards free of charge as are secured to the General Government. Take, for example, a State university as typical of the State institutions referred to in your communication. Many of the States of the Union provide in their constitutions for the establishment of a State university, and under and pursuant to such provisions the legislatures of the various States have enacted laws for the support, government, and control of such institutions of learning; and, while such institutions are not, properly speaking, the "State government," they are nevertheless performing and discharging well-recognized functions of the State government, and if any services, such as are contemplated to be furnished by the National Bureau of Standards, should be necessary for such an institution in carrying out the purposes for which it was established, it is clear that the expense of such services would very naturally and properly be borne by the State.

It is, therefore, my opinion that section 8 of the law here under discussion contemplates that whenever a State institution finds it necessary, in the performance of the duties and functions imposed and contemplated by the laws of the State, to call upon the National Bureau of Standards for such services as are specified in section 8 of said act, that

the "State government," of which such institution is a part, would be entitled to have such services performed by the National Bureau of Standards free of charge.

As to what State officer or officers should be recognized as having authority to call for the services of the National Bureau of Standards without charge, seems to me to be in the nature of an administrative question. Permit me, however, to call your attention to certain provisions of the law, which, in my judgment, confer upon you the power to obviate any such difficulty in the practical administration of this law.

It is provided in section 3, of the act of March 3, 1901, that all requests for the services of the bureau shall be made in accordance with the rules and regulations herein established; and by section 9 of said act it is provided, "that the Secretary of the Treasury shall, from time to time, make regulations regarding the payment of fees \* \* \* and such other matters as he may deem necessary for carrying this act into effect."

It is hardly necessary for me to suggest that under such express provisions of the law you are clothed with ample authority to provide by regulation precisely what officer or officers of the "State government" shall be recognized by the Bureau of National Standards in case a "State government" should call upon said bureau for the services specified in the law.

Respectfully,

P. C. KNOX.

The SECRETARY OF THE TREASURY.

---

#### CONSULS—INSPECTION CARDS—UNOFFICIAL SERVICES.

The President may prescribe a fee, as provided by section 1745, Revised Statutes, for the services of a consul in furnishing inspection cards to steerage passengers on vessels destined to the United States, as required by the Quarantine Regulations of April 1, 1903, but he has no authority to declare such a fee unofficial and to permit the consul to retain it as such.

No service by a consul can be unofficial when the applicant has a right to demand it and the consul no right to refuse it.

## DEPARTMENT OF JUSTICE,

*June 11, 1903.*

SIR: I have the honor to acknowledge the receipt of your communication of June 5, 1903, in which you ask for my opinion as to the authority of the President to decide that the service of a consul in furnishing inspection cards to steerage passengers on vessels destined to the United States, as required by the quarantine regulations promulgated by the Secretary of the Treasury April 1, 1903, is unofficial, and to establish a fee for such services, likewise unofficial, and which may be retained by the consul.

The act of Congress approved February 15, 1893 (27 Stat., 449), granting additional quarantine powers and imposing additional duties upon the Marine-Hospital Service, among other things, provides:

“The Secretary of the Treasury shall make such rules and regulations as are necessary to be observed by vessels at the port of departure and on the voyage, where such vessels sail from any foreign port or place to any port or place in the United States, to secure the best sanitary condition of such vessel, her cargo, passengers, and crew; which shall be published and communicated to and enforced by the consular officers of the United States.” (Sec. 3.)

“The Secretary of the Treasury shall from time to time issue to the consular officers of the United States and to the medical officers serving at any foreign port, and otherwise make publicly known, the rules and regulations made by him, to be used and complied with by vessels in foreign ports, for securing the best sanitary condition of such vessels, their cargoes, passengers, and crew, before their departure for any port in the United States, and in the course of the voyage; and all such other rules and regulations as shall be observed in the inspection of the same on the arrival thereof at any quarantine station at the port of destination, and for the disinfection and isolation of the same, and the treatment of cargo and persons on board, so as to prevent the introduction of cholera, yellow fever, or other contagious or infectious diseases; and it shall not be lawful for any vessel to enter said port to discharge its cargo, or land its passengers, except upon a certificate of the health

officer at such quarantine station certifying that said rules and regulations have in all respects been observed and complied with, as well on his part as on the part of the said vessel and its master, in respect to the same and to its cargo, passengers, and crew." (Sec. 5.)

Proceeding under the authority of the above-mentioned act, the Secretary of the Treasury, April 1, 1903, promulgated the quarantine laws and regulations now in force. These regulations specifically require that each steerage passenger shall be furnished with an inspection card of a particular kind, which shall be stamped by the consul or medical officer at the port of departure.

The duty to furnish such inspection card, properly stamped, has been imposed upon consuls by the Congress, and is therefore official. The President may prescribe a fee for this official service, but no authority has been given him to declare such a fee unofficial and to permit the consul to retain the same as such.

Section 1745 of the Revised Statutes gives the President authority to prescribe what fees may be charged by consuls for official services, "and to designate what shall be regarded as official services, besides such as are expressly declared by law." This section does not, in my opinion, authorize the President to make unofficial any services, the duty to perform which has been imposed upon the consul by the Congress. When the Congress has directed a consul to perform any particular service without fixing a fee for the same, the President may prescribe a fee therefor. In such a case both the service and the fee would be official, and it would be necessary for the consul to account therefor, as provided by law.

The distinction between official and unofficial fees has been elaborately discussed in *United States v. Badeau* (33 Fed. Rep., 572; 31 Fed. Rep., 697); *Mosby v. United States* (24 Ct. Cls. R., 1); *United States v. Mosby* (133 U. S., 273). These opinions seem to make it entirely clear that every service, the duty to perform which has been imposed on a consul by law, is official, and that no service by such officer can be unofficial when the party desiring the same has the right to demand it and the consul no right to refuse to give

it. Certainly no consul, upon proper demand, could rightfully refuse to issue to a steerage passenger the inspection card provided for by the quarantine regulations when such passenger had complied with all necessary conditions.

Very respectfully,

P. C. KNOX.

The SECRETARY OF STATE.

---

FALSE LABELING OF DAIRY AND FOOD PRODUCTS.

The act of July 1, 1902 (32 Stat., 632), prohibiting the introduction into any State or Territory of any dairy or food product which shall have been falsely labeled or branded as to the State or Territory where grown, applies not only to domestic articles, but also to those imported from foreign countries which are labeled as being of domestic origin.

The Department of Agriculture and the Treasury Department have no jurisdiction or power under the act of March 3, 1903 (32 Stat., 1157), to prevent or punish the false labeling or branding of dairy or food products after they have passed the custom-house and are delivered to the owner or consignee.

DEPARTMENT OF JUSTICE,

*June 13, 1903.*

SIR: In your note of June 2, 1903, you transmit to me an excerpt from the appropriation act of March 3, 1903 (32 Stat., 1157, 1158), authorizing the Secretary of Agriculture to investigate the adulteration of foods, drugs, and liquors, and forbidding the Secretary of the Treasury to deliver to the consignee any such goods imported from a foreign country which the Secretary of Agriculture has "reported to him to have been inspected and analyzed and found to be dangerous to health, or which are forbidden to be sold, or restricted in sale in the countries in which they are made, or from which they are imported, or which shall be falsely labeled in any respect in regard to the place of manufacture, or the contents of the package," and a copy of the act of July 1, 1902 (32 Stat., 632), in regard to the introduction into any State or Territory or the District of Columbia of any dairy or food products which shall have been falsely labeled or branded as to the State or Territory in which they are made, produced, or grown; and you ask my opinion, in

substance, whether, under the provisions referred to, you have jurisdiction or power to prevent the false labeling or branding of such articles imported from foreign countries, after they have passed the custom-house and are delivered to the consignees: and whether the act last referred to above applies to such articles imported from foreign countries, or applies only to articles of domestic production.

In reply to your questions, I have the honor to say that, under the provisions of the act of March 3, 1903, to which you refer, the jurisdiction and power of your Department, and that of the Treasury Department, in respect of the matter here considered, end with the delivery of the imported article from the custom-house to the owner or consignee, and this provision of the act confers no power to prevent or punish the false labeling or branding of such imported articles after such delivery to the owner or consignee. The whole power there conferred in this respect is to examine such imported articles before such delivery, and to refuse delivery if found to come within the ban of the act. Whatever power there may be to prevent or punish the false labeling or branding of such imported goods after such delivery must be looked for elsewhere.

If the evils of false labeling of such imported articles have reached a magnitude requiring Congressional legislation, it would seem almost, or quite, as important to prevent such false labeling after the articles have passed the custom-house as before; and it would seem that Congress, while having the matter directly in hand, has omitted what would have been very appropriate legislation. But this omission can not be supplied by those called upon to interpret or to administer the law.

But I think the act of July 1, 1902, may be resorted to for partial relief from the evil to which you refer. The first section provides:

“That no person \* \* \* shall introduce into any State or Territory of the United States or the District of Columbia from any other State or Territory of the United States or the District of Columbia, or sell in the District of Columbia or in any Territory any dairy or food products which shall be falsely labeled or branded as to the State or

Territory in which they are made, produced or grown, or cause or procure the same to be done by others."

The second section provides the penalty for violation of the act.

The prohibition is of the introduction into any State or Territory or the District of Columbia *from* any other State or Territory or the District of Columbia, and the sale in said District or any Territory of dairy or food products which are "falsely branded or labeled as to the State or Territory in which they are made, produced, or grown."

It is important to notice that the prohibition extends to falsely labeled articles *introduced or brought from* another State or Territory, and is not confined to articles which are made, produced, or grown in some other State or Territory of the United States. If dairy or food products, which are falsely labeled or branded as to the State or Territory of their origin, are introduced or brought into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, or are sold in any Territory or said District, this is clearly within the prohibition of the act, no matter whether such articles were of domestic or foreign origin. I repeat, the section does not confine or purport to confine its prohibition to the introduction of falsely labeled articles made, grown, or produced in this country, but extends it to all such articles *introduced from* another State or Territory which are falsely labeled "as to the State or Territory in which they are made, produced, or grown."

But, as I have stated above, the act can give only partial relief; for it is plain from the context that the words "State or Territory" refer to a State or Territory of the United States, and can not be extended to include the wider signification of *foreign country*. Thus, if articles of foreign origin are imported into New York, for example, and thence introduced into another State or Territory with a label or brand falsely stating their origin *as to another foreign country*, the case would not fall within the provisions of the statute. On the other hand, it is certain that if foreign articles imported into New York are introduced into another State or Territory with a label or brand showing



them to be of New York make or growth, such articles would be "falsely labeled or branded as to the State or Territory in which they are made, produced, or grown," and such introduction would be within both the letter and the spirit and purpose of the act.

In this respect Congress can interfere only with interstate trade. It can prevent the use of false labels of dairy or food products only when they become objects of commerce between different States or Territories. Hence, the prohibition is confined to articles introduced from one State or Territory into another. But this does not imply, nor is there anything to imply, that the prohibition is confined also to articles made, produced, or grown in the State or Territory from which they are introduced, or to articles of domestic origin. It is the use of false labels on dairy and food products in interstate commerce which is prohibited. And if it is interstate commerce, it is quite unimportant whether the articles falsely labeled were of domestic or foreign origin. If an imported article of foreign origin is labeled as of domestic origin, the article is "falsely labeled or branded as to the State or Territory in which it is made, produced, or grown;" and if such article, thus falsely labeled, is introduced from one State or Territory into another, or the District of Columbia, it is a violation of the act. Nor does it make any difference in this respect whether the false label or brand be placed on the article before or after leaving the custom-house in a case of foreign importation.

If it were required, a familiar rule of construction might be invoked in support of this interpretation. Statutes should be construed in aid of their manifest purpose and object. And when it is considered that the sole purpose of this act is to prevent the use of false labels or brands of dairy or food products, when articles of interstate commerce, it is manifest that a construction which limits the prohibition to domestic articles would defeat, rather than aid the purpose of the act. Indeed, the greater and more prevalent evil in this respect is not in falsely stating a particular State or Territory as the origin of a domestic article, but is the labeling of a foreign article as the product of some

particular State or Territory, or *vice versa*. This is the more serious and prevalent evil, and, in my opinion, is as certainly forbidden by the act referred to as is the labeling of an article of one State or Territory as being the product of another.

I am, therefore, of opinion that the act of July 1, 1902, applies not only to domestic articles, but also to those imported from foreign countries which are labeled as being of domestic origin.

Respectfully,

P. C. KNOX.

The SECRETARY OF AGRICULTURE.

---

CRUISER GALVESTON—RELEASE FROM POSSESSION OF  
STATE COURT.

The Attorney-General defers answering the question as to the right of the Secretary of the Navy, under the direction of the President, to employ the military forces of the Government to obtain possession of the cruiser *Galveston*, in course of construction under contract with the Wm. R. Trigg Company, of Richmond, Va., which company has gone into the hands of a receiver appointed by the chancery court of Virginia, for the reason that a method of procedure in such cases is provided for by section 3753, Revised Statutes, and occasion for the exercise of this power is not likely to arise if the stipulation authorized by that section is filed.

No instrumentality of the Government may be taken into custody and held under any adverse authority whatever. This applies as well to an instrumentality in process of creation as to one already completed. The United States is entitled to the undisputed possession and control of its property and of property in which it is interested to the extent of that interest, and this possession and control are exempt from the process of every court.

The word "stipulation," as used in section 3753, Revised Statutes, denotes an undertaking in the nature of bail, and is analogous to the "stipulation for value" under present admiralty practice, the measure of the Government's obligation being limited in section 3754, Revised Statutes, to "the value of the interest of the United States in the property in question."

The discretion of courts relative to such "stipulation" is practically limited to a consideration of the bond or equivalent engagement and the sufficiency of the sureties where security is required, the release of the property following as matter of right.

## DEPARTMENT OF JUSTICE,

June 19, 1903.

SIR: Your reference under date of June 17, of a letter of the Secretary of the Navy to you dated June 15, raises the question of the right and power of the United States to take immediate and complete possession, for all purposes, of vessels of the United States in course of completion under contracts with shipbuilders, when there has been a breach of contract by the latter. The question at present actually affects three vessels, and might at any time involve any or all public vessels under construction by private parties. The subject is therefore of vital importance in respect to national and sovereign interests.

The particular and immediate case presented is that of the cruiser *Galveston*. The facts are these: Under the act of March 3, 1899, authorizing the construction of six protected cruisers, the Navy Department made a contract with the Wm. R. Trigg Company, of Richmond, Va., for the construction of the cruiser named. The contract provided, among other things, that as the work progressed the Government should have a lien for payments made; that the Government lien should be paramount; that upon failure of the company to go forward with the work, the Secretary of the Navy might declare the contract forfeited; that in the event of such failure and forfeiture of the contract, and after certain administrative proceedings, title to the vessel at any stage of the work should vest in the United States, and that the *res* should be surrendered by the company, so that the Government might proceed forthwith to its completion. The company has gone into the hands of a receiver under State laws; subsequently the contract was duly declared forfeited, and the United States took possession of the vessel by its officers, and it is now proposed to launch her on or about the 19th instant, preparatory to completion by the United States. The amount of the payments made under the contract is \$698,514.45.

It appears that certain lien claimants and material men object to this course; that they challenge the exclusiveness of the Government title and the priority of its lien, and insist on the receiver's possession and the jurisdiction of the

State tribunal. The question of law is whether the United States is legally entitled to proceed as proposed.

It is unnecessary to consider the authorities defining certain qualifications upon the doctrine of Government exemption from suit, or validating liens under some circumstances against property owned or claimed by the Government. Such authorities do not seem to me to be applicable to the present situation. Nor is it necessary to advert to the express recognition by this contract of the paramount title and lien of the Government and the explicit provision for surrender by the company in the contingency which has happened—provisions creating conditions and covenants which, it would seem, devolve upon and bind the receiver on principle and authority, especially in view of his endeavors to adopt the contract and continue work thereunder. It may be remarked that in this way the receiver appears to have ratified the contract, if, indeed, his ratification were essential to the Government right to effectuate complete possession under the plain and specific terms of the instrument.

But I do not need to consider these points, because in my opinion the case is ruled by section 3753 of the Revised Statutes, which enacts:

*“Whenever any property owned or held by the United States, or in which the United States have or claim an interest, shall, in any judicial proceeding under the laws of any State, district, or Territory, be seized, arrested, attached, or held for the security or satisfaction of any claim made against such property, the Secretary of the Treasury, in his discretion, may direct the Solicitor of the Treasury to cause a stipulation to be entered into by the proper district attorney for the discharge of such property from such seizure, arrest, attachment, or proceeding, to the effect that upon such discharge, the person asserting the claim against such property shall become entitled to all the benefits of this and the following section. Nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned, or*

employed by the United States, or by any Department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim."

Section 3754 provides that in all cases where such stipulation is entered, and the property discharged, and final judgment is given affirming the claim adverse to the Government for which the proceedings were instituted, the person in interest shall be entitled to such rights as he would have had in case possession of the property had not been changed; and thereupon, if the claim is for the payment of money which is found by said final judgment to be due, the amount shall be paid out of the Treasury.

The law thus provides that whenever the United States owns or holds property, or claims an interest therein, and judicial proceedings in any court seek to attach and retain the same, the Government may stipulate to discharge from the seizure and arrest, and thereupon adverse claims are fully protected. The right of a party in ordinary litigation to a release of property from attachment upon giving a bond for indemnity is fundamental. That doctrine was recognized in the debate on the act of 1864 which now appears in the above sections of the law. It manifestly applies with greater force and reason in a case affecting the Government as *parens patriæ* than where the interests of private litigants alone are involved. The statute enables the Government, although not a party, nor in general subject to be made such, to intervene without prejudice and to invoke that doctrine. It is especially significant that section 3753, which is, of course, a part of the supreme law of the land and binding throughout the Union, expressly refuses to recognize any right whatever to seize or attach property of the United States, or property held, owned, or employed by it. Quite apart from the statute, and because of the nature of the case, it is impossible, on primary grounds, to yield assent at all to the idea that any instrumentality of the Government—in this case an instrumentality of prime importance—may be taken into custody and held under any adverse authority whatever. This view applies, in my judgment, whether the adverse custody should assume to

attach upon the instrumentality as a completed thing or upon one in process of creation.

While, however, it is not to be doubted for a moment that the United States is entitled to the undisturbed possession and control of its property and of property in which it is interested to the extent of that interest, and that this possession and control are exempt from the process of every court, yet, in order to avoid unseemly clashing and hostile demonstration upon the part of creditors or claimants, with that beneficent disposition which has always marked its policies toward the people, Congress, by the act of 1864 (Rev. Stat., secs. 3753, 3754), provided an orderly and peaceful solution of controversies that may arise between parties claiming adverse to the United States, under the terms of which the utmost rights of all claimants are preserved without the functions of the Government being in the slightest degree disturbed. It will be observed, however, that this act is not mandatory in its provisions and that in a palpable case of improper interference with the Government's rights the strong Executive arm may be relied upon for the protection of its sovereignty, the language of the act being that the Secretary of the Treasury *may* in his discretion cause such stipulation to be entered. This is a case in which I think that discretion should be exercised.

But it may be suggested that the "stipulation" of the law quoted merely means an agreement with claimants or their counsel, and that all which the statute affects is to authorize the Government to enter into such an agreement subject to the willing disposition of the opposing parties. That is not my opinion. Such authority was already possessed by the Government and is elsewhere recognized and provided for. It is true that the word "stipulation," originally drawn from the civil law, often signifies an agreement between counsel affecting procedure; but the term is evidently used in section 3753 to denote an undertaking in the nature of bail. Abbott's Law Dictionary gives this definition:

"*Stipulation.* 1. An instrument of much importance in the practice of admiralty courts, being an engagement in

the nature of bail or of a recognizance or undertaking given to procure discharge for the time being of the *res* when it has been seized, or of the defendant when he has been arrested."

The "stipulation for value," in admiralty under present practice (Benedict's Admiralty, p. 281, sec. 498; District Court Rules, No. 17, *id.*, p. 432) furnishes a close analogy; and the measure of the Government's obligation upon entry of the stipulation and discharge of the property is indicated in the last sentence of section 3754, viz, " \* \* \* the value of the interest of the United States in the property in question." I am of the opinion that the above meaning of the word "stipulation" is not necessarily restricted to admiralty law; that it may be applied to property in general in proper cases, and was employed by Congress with this intention and meaning in section 3753. And it can not be questioned that the discretion of courts relative to such "stipulations" is practically limited to consideration of the amount of the bond or equivalent engagement and the sufficiency of the sureties where security is required, as is ordinarily the case, but not when the Government is obligor as under this statute. The release of the property follows as of right.

The nature and necessities of the subject, the sovereign claim and interest, the object to be gained, the words of the statute, its fair inferences and clear reservations, all convince me beyond doubt that the "stipulation to be entered into" is an engagement on behalf of the United States which shall be addressed to and filed with the particular court, under proper reserve of submission to the jurisdiction, whereupon discharge of the property as matter of course would follow, and adverse claimants would have the opportunity of establishing, in accordance with the law, their respective claims against the bond of idemnity thus provided.

From another point of view a certain analogy is furnished by the laws relating to the removal of causes, under which, when the various statutory reasons exist, a petition for removal with sufficient security makes it the duty of the State court to proceed no further in the cause, and in effect ousts its jurisdiction and confers jurisdiction upon the Federal

court. So, here, I can not doubt that the stipulation, when presented and entered into as the engagement of the United States, will operate forthwith to discharge the property and free it from the State jurisdiction, that the chancery court of Virginia, upon the entry of this instrument and consideration of the law now invoked, will take whatever action may be necessary or desirable to conform its records to the supreme law and to prevent any clash of authority.

One further point remains to be considered. The letter of the Secretary of the Navy requests to be authorized to employ, if necessary, the military forces of the Government at his disposal for the execution of his orders in the premises. I am loath to believe that occasion for such exertion of the Federal power will arise, being confident that any claim to interfere with the national rights under the judicial authority of the State of Virginia will be promptly disposed of and denied by the chancery court. For this reason I shall defer answering that question.

Very respectfully,

P. C. KNOX.

The PRESIDENT.

---

UNITED STATES COMMISSIONERS—ISSUE OF SEARCH  
WARRANTS.

Although no compensation is provided therefor, it is the duty of United States commissioners to issue search warrants in internal revenue cases when properly applied for.

Section 3462, Revised Statutes, providing for the issue of these warrants, does not state all that must be included in the application therefor. The Fifth Amendment to the Constitution provides that "no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

If a United States commissioner refuses, on proper application, to issue a search warrant, the facts may be brought by petition or otherwise to the attention of the court appointing such recusant officer, for such action as it deems proper.

DEPARTMENT OF JUSTICE,

*June 19, 1903.*

SIR: From your letter of January 24, 1903, and the papers transmitted therewith, it appears that a United States commissioner at Atlanta, Ga., refuses to issue search warrants on the application of officers and agents of the Internal-



Revenue Service in the performance of their duties because, as held by your Department, the law does not provide a fee for that specific service, and you submit the questions: (1) Whether the law does allow United States commissioners any fee for issuing search warrants? (2) If not, are such commissioners required to issue such warrants when properly applied for? And (3) What course should be pursued in case a commissioner refuses to do so?

Section 19 of the act of May 28, 1896 (29 Stat., 184), which abolished the office of commissioner of the circuit courts, created the office of United States commissioner and imposed upon the district court the duty of appointing such officers. It was therein provided that such commissioners "shall have the same powers and perform the same duties as are now imposed upon commissioners of the circuit courts;" and that "all acts and parts of acts applicable to commissioners of the circuit courts, *except as to appointment and fees*, shall be applicable to United States commissioners appointed under this act."

Section 21 of that act, which fixes the fees of United States commissioners, provides "that each United States commissioner shall be entitled to the following-named fees *and none other*."

The section then specifically names each particular service and fixes the fee therefor; but nowhere provides for issuing the warrants here in question nor any fee therefor. Hence, if the only duties required of such commissioners are those prescribed by this section, they are not required to issue such warrants.

Section 3462, Revised Statutes, provides that—

"The several judges of the circuit and district courts of the United States, and commissioners of the circuit courts, may, within their respective jurisdictions, issue a search warrant, authorizing any internal-revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of said premises."

While this provision is, in terms, permissive only, yet by a familiar rule of construction, such a statute, relating

to the performance of a public duty by a public officer, is mandatory in its requirement. This section imposes upon the commissioners of the circuit courts the duty of issuing such warrants when proper application therefor is made; and this duty, thus imposed, is, by section 19 of the act of May 28, 1896, imposed upon the present United States commissioners. And, because the law imposes upon the commissioners the duty of issuing search warrants, when properly applied for, I should have no doubt that they were entitled to compensation therefor, but for the positive prohibition of section 21 of the act referred to (*United States v. McDermott*, 140 U. S., 151).

But, the implication that this prohibition was intended to exclude all compensation not provided for in that section, even though for other services expressly required by law—and specifically for issuing these search warrants—is still stronger from the fact that this section was enacted after the provisions requiring commissioners to issue search warrants, of the existence of which Congress must be presumed to have been aware.

Ordinarily, where an officer's compensation is by specific fees for specified services or duties, Congress does not impose upon or require of such officer other responsible duties or services without additional compensation therefor. But Congress may, and has, at times, done so. While compensation is ordinarily provided for official service, yet the obligation of an officer to perform any duty imposed upon him by law is not at all dependent upon whether he receives any compensation especially for that service or not. No one is compelled to accept the office of United States commissioner, and if one does accept it, he is presumed to undertake the performance of all the duties of such office for the compensation provided by law. As is said by the Supreme Court in *United States v. Shields* (153 U. S., 88, 91):

“Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts nor to any discretionary action on the part of the officials.”

Since the passage of the act here considered, your Department, through the Comptroller of the Treasury, has uni-

formly held that section 21 of the act not only has not provided for, but has expressly prohibited any compensation to commissioners for issuing search warrants on application of internal-revenue officers or agents. In this I am not prepared to say the Comptroller was wrong. On the contrary, I think he was bound to take the law as thus plainly enacted. However inadvertent may have been the omission of a provision for compensating commissioners for this responsible service, it can not be corrected or supplied by executive officers called upon to administer the law.

The section providing for the issue of these search warrants does not state all of that which must be stated in the application therefor. The Fourth Amendment to the Constitution provides that "no warrant shall issue, but upon probable cause, supported on oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." The determination of the question whether this requirement and those of the section referred to have been met, and whether the warrant should issue in a particular case, is a highly responsible and important duty; but however responsible and important, no provision is made in the section referred to, nor elsewhere, for its compensation.

I am therefore of the opinion that, although no compensation is provided therefor, it is the duty of United States commissioners to issue search warrants in internal-revenue cases when properly applied for.

The answer to the question of what course should be pursued in case a commissioner refuses, on proper application, to issue a search warrant, may be answered by stating that the power to remove such commissioners; by section 19 of the act creating the office, is vested in the court which appoints them. In case of such refusal, the officers of your Department may, by petition or otherwise, bring the facts to the attention of the court appointing such recusant officer, in order that the court may take such action upon the complaint as it deems proper.

Respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

IDENTIFICATION OF PART BLOOD MISSISSIPPI CHOCTAW INDIANS.

Paragraph 41 of the agreement of March 21, 1902, between the United States and the Choctaw and Chickasaw tribes of Indians, ratified by act of Congress approved July 1, 1902 (32 Stat., 641), does not authorize the identification of part-blood children of Mississippi Choctaws who are themselves identified solely by reason of full blood. Such children must, in some other way, if possible, establish their claims to participate in the benefits arising from the treaty of September 27, 1830 (7 Stat., 333), between the United States and the Choctaw Nation.

DEPARTMENT OF JUSTICE,

*June 19, 1903.*

SIR: I have the honor to acknowledge the receipt of your communication dated June 8, 1903, wherein you say:

"The agreement between the United States and the Choctaw and Chickasaw tribes of Indians, ratified by the act of Congress approved July 1, 1902 (32 Stat., 641), contains a paragraph (41) which reads as follows:

All persons duly identified by the Commission to the Five Civilized Tribes under the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stat., 495), as Mississippi Choctaws entitled to benefits under article 14 of the treaty between the United States and the Choctaw Nation concluded September 27, 1830, may, at any time within six months after the date of their identification as Mississippi Choctaws by the said Commission, make *bona fide* settlement within the Choctaw-Chickasaw country, and upon proof of such settlement to such Commission within one year after the date of their said identification as Mississippi Choctaws shall be enrolled by such Commission as Mississippi Choctaws entitled to allotment as herein provided for citizens of the tribes, subject to the special provisions herein provided as to Mississippi Choctaws, and said enrollment shall be final when approved by the Secretary of the Interior. The application of no person for identification as a Mississippi Choctaw shall be received by said Commission after six months subsequent to the date of the final ratification of this agreement and in the disposition of such applications all full-blood Mississippi Choctaw Indians and the descendants of any Mississippi Choctaw Indians whether of full or mixed blood who received a patent to land under the said fourteenth article of the said treaty of eighteen hundred and thirty who had not moved to and made *bona*

*vide* settlement in the Choctaw-Chickasaw country prior to June twenty-eighth, eighteen hundred and ninety-eight, shall be deemed to be Mississippi Choctaws, entitled to benefits under article fourteen of the said treaty of September twenty-seventh, eighteen hundred and thirty, and to identification as such by said Commission, but this direction or provision shall be deemed to be only a rule of evidence and shall not be invoked by or operate to the advantage of any applicant who is not a Mississippi Choctaw of the full blood, or who is not the descendant of a Mississippi Choctaw who received a patent to land under said treaty, or who is otherwise barred from the right of citizenship in the Choctaw Nation, all of said Mississippi Choctaws so enrolled by said Commission shall be upon a separate roll.

“A question arose as to whether, under a proper construction of the provisions of said paragraph, the identification of a party as a full-blood Mississippi Choctaw Indian, which gave him a right to settle in the Choctaw-Chickasaw country, and, upon proof of such settlement, to be enrolled as a Mississippi Choctaw entitled to allotment, gives to his part-blood children the same rights.

“It was and is contended upon the part of the Choctaw and Chickasaw tribes that such part-blood children must, to entitle themselves to enrollment as Mississippi Choctaws, submit proof that they are descendants of a Mississippi Choctaw Indian who received a patent to land under the fourteenth article of the treaty of 1830, referred to in said paragraph.

“Upon consideration of the matter, this Department, on March 17, 1903, decided and held that the children of an identified full-blood Mississippi Choctaw Indian, whether they were of full or part blood, were entitled to be identified and admitted to enrollment as Mississippi Choctaws. The Choctaw and Chickasaw tribes have asked a review and reconsideration of this decision.

“The question involved is one of grave importance both to said nations and the persons claiming to be Mississippi Choctaws. It is necessary to the proper protection of the interests of all parties, as well as to the early completion of the rolls of said Indians, that a correct decision of the question be arrived at as soon as may be. Because of the difficulties presented in determining as to the construction to

be given this provision of law, I respectfully submit the matter with a request to be advised whether the conclusion heretofore announced by this Department is the correct one and should be adhered to."

Appreciating the importance of the question involved, I asked representatives of the adverse interests to submit arguments and briefs. This they did and thereby aided me very materially.

Prior to the agreement of March 21, 1902, between the United States and the Choctaw and Chickasaw Indians, the Commission to the Five Civilized Tribes had held:

"In order for applicants to be identified as Mississippi Choctaws under the fourteenth article of the treaty of 1830, they may not inferentially show, but must reasonably demonstrate, that they are direct lineal descendants of a Choctaw who was living at the date of the treaty of 1830, and who complied, directly or indirectly, with the provisions of the fourteenth article, or who was adjudged a beneficiary thereunder. The applicants may not rely upon the compliance of a remote ancestor if at the time of the treaty there was living an ancestor less remote than the one through whom they claim. In that event, the proof of compliance must be shown on the part of such nearest ancestor irrespective of whether he or she was the head of a family at that time, or a minor child, who must have been represented in such compliance by his or her parents or guardians." (Report 1902, p. 28.)

This rule seems to have been well established and to have been acted on by the Commission for a considerable time before March, 1902.

The same Commission, in its report to the Secretary of the Interior for the year 1901, page 21, had said:

"Requiring a strict compliance with the fourteenth article of the treaty of 1830 by ignorant full-blood Choctaw Indians in the State of Mississippi will produce but little, if any, result favorable to them. That these Indians now live there and that they and their families and foreparents have lived there for the past seventy years is unquestionable; that they are Choctaw Indians no one can doubt. They speak the same language of the Choctaws residing in Indian Terri-

tory, and have the same manners and customs and general appearance. Are they to be precluded from ever sharing in the property rights of the Choctaw Nation in Indian Territory, or shall the Governments of the United States and the Choctaw Nation, in their generosity, adopt and make them citizens of the Choctaw Nation? Even such an act of generosity would but little benefit them, for without means of removal they would be unable, poor as they are, to reach the rich lands of the Choctaw Nation that might be bestowed upon them. Reference is here made to the neglected full-blood Choctaw Indians now residing in Mississippi, and not to the great army of apparent whites and negroes who have presented themselves in the State of Mississippi and in Indian Territory, but whose case also requires solution."

With such facts and suggestions before them, the parties thereto entered into the agreement of March 21, 1902. It was subsequently ratified by the United States and the Indians, and so became effective. This agreement must, of course, be construed in the light of the circumstances under which it was made, and with a purpose to ascertain the intention of the parties thereto. Manifestly the parties did not intend to abridge the rights of any person theretofore entitled by law to identification as a Mississippi Choctaw, but they did intend to permit the identification of some persons who had not, prior to that time, been able to bring themselves within the requirements of the rules established by the Commission—persons, the evidence of whose rights under the treaty of 1830 could not be secured, but whom the Government of the United States and the Choctaw Indians, "in their generosity," desired should share in the benefits arising out of the provisions of that treaty.

With such purpose and intention in view, paragraph 41 of the agreement of 1902 was adopted.

Under the practice of the Commission, it has long been necessary for *every* individual desiring to be identified, either by himself or through another, to make application therefor. Paragraph 41 provides:

"In the disposition of such applications all full-blood Mississippi Choctaw Indians and the descendants of any

Mississippi Choctaw Indians whether of full or mixed blood who received a patent to land under the said fourteenth article of the said treaty of eighteen hundred and thirty \* \* \* shall be deemed to be Mississippi Choctaws, entitled to benefits under article fourteen of the said treaty of September twenty-seventh, eighteen hundred and thirty, and to identification as such by said Commission. \* \* \*

If a part-blood child of a full-blood Choctaw identified solely by reason of full blood, was intended to be included and provided for by the provision for such ancestor, it is difficult to understand why this peculiar language was used, as it would have been easy to specify that purpose in plain terms. A child of a full blood of that class is not necessarily included in the language just quoted, and apparently he was intended to be excluded by the specification of "descendants of any Mississippi Choctaw Indians, whether of full or mixed blood, who received a patent to land."

For the purpose of clearly pointing out the individuals who were to be admitted under the language above quoted, this further provision was added:

"But this direction or provision shall be deemed to be only a rule of evidence and shall not be invoked by or operate to the advantage of any applicant who is not a Mississippi Choctaw of the full blood, or who is not the descendant of a Mississippi Choctaw who received a patent to land under said treaty. \* \* \*

A part-blood child of a full-blood Mississippi Choctaw identified solely on account of his blood can not, by reason of such descent alone, be classed either as a "Mississippi Choctaw of the full blood" or as a "descendant of a Mississippi Choctaw who received a patent to land;" and if paragraph 41 be so construed as to require identification of such child because his ancestor has been identified as a full blood, the clear language last quoted therefrom will be set at naught. Any interpretation which leads to such result should not be adopted unless absolutely necessary. If, on the other hand, paragraph 41 be construed to apply only to applicants who are themselves "full-blood Mississippi Choctaw Indians," or "the descendants of any Mississippi



Choctaw Indians, whether of full or mixed blood who received a patent to land," every word of such paragraph will be effected.

There is undoubtedly much in the theory that an "intention to authorize the enrollment of a person as a citizen of the Indian nation, and at the same time to exclude that person's descendants, can not be presumed;" and much also may be said in support of the contention that by the identification of a full-blood Indian as a Mississippi Choctaw, the Commission thereby judicially determines him to be a descendant of one who complied with the treaty of 1830, and therefore his child, upon proof of such relationship, establishes descent from a complying ancestor. But the peculiar language of paragraph 41 appears to me to be directly in conflict with the conclusions sought to be established as the result of such reasoning, and to forbid them. The Choctaw Indians, by entering into an agreement giving certain rights to their full-blood brethren, can not be conclusively presumed to have thereby extended the same rights to part-blood children of such brethren, when the terms of the agreement do not clearly include the children; and especially would it be improper, by construction or presumption, to bring about such a result, when the language of the agreement itself shows the contrary intention was in the minds of the contracting parties. To permit a part-blood child of a Mississippi Choctaw identified solely on account of full blood, to make application for identification, and to invoke the direction and provision of paragraph 41 and secure operation of the same to his advantage, would be in violation of the very terms of the agreement itself. The special privileges granted to full bloods by the agreement in question were, at least, in the nature of gifts by the Choctaws; and because alone of favors extended and expressly limited to a father, a purpose to bestow the same privileges on his child can not properly be presumed.

In my opinion paragraph 41 of the agreement of March 21, 1902, does not authorize the identification of part-blood children of Mississippi Choctaws themselves identified solely by reason of full blood. Such children must in some other way, if possible, establish their claims to participate in the

benefits arising from the treaty of 1830. They have not been deprived by the agreement of anything to which they were entitled before its conclusion; neither does the agreement extend to them the right to identification solely because they are children of an ancestor himself identified by reason alone of his full blood.

I therefore advise you that the conclusion heretofore announced by the Department of the Interior in reference to this matter is incorrect and should not be adhered to.

Respectfully,

P. C. KNOX.

THE SECRETARY OF THE INTERIOR.

---

#### FALSE LABELING OF DAIRY AND FOOD PRODUCTS.

The use of the words "Birkenwald's Daisy Sugar Corn, S. Birkenwald Co., Milwaukee, Wis.," by that company on canned goods produced in another State, is a violation of section 1 of the act of July 1, 1902 (32 Stat., 632), which prohibits the false labeling or branding of dairy or food products. These words clearly imply that the goods referred to were manufactured or prepared in Wisconsin.

Wherever the natural inference to be drawn from the form or words of a brand or label is contrary to the fact as to the State or Territory in which the article referred to is made, produced, or grown, the case would seem to be within the letter and spirit of the above-named act.

DEPARTMENT OF JUSTICE,

*June 22, 1903.*

SIR: I beg to acknowledge the receipt of your letter of the 11th instant, inclosing one addressed to you by the S. Birkenwald Company, of Milwaukee, Wis., together with two samples of labels which they have submitted for your approval, and in which you say:

"These labels do not seem to fall within either class on which you passed your opinion of September 20. The goods described by these labels purport to be in every respect goods manufactured by the S. Birkenwald Company. They say in their letter, however, that they purchase all their goods in Iowa.

"The question which I desire to propound particularly in this respect is the following: Is not the label of S. Birk-

enwald, as it stands, a distinct statement that the product bearing it is manufactured and prepared in Wisconsin?"

One of the labels considered in the opinion of September 20 (24 Opin., 125) read: "Packed for W. L. Taylor Co., Ltd., wholesale grocers, Shreveport, La." The other omitted the words "packed for" and "wholesale grocers," and was in these words: "The T. C. Brand Lima Beans, W. F. Taylor Co., Ltd., Shreveport, La." They were held not to come within the act of July 1, 1902 (32 Stat., 632), regulating this subject.

The labels now submitted (which are to be used on canned goods) are substantially alike in form and character. One bears the words "Birkenwald's Daisy Sugar Corn, S. Birkenwald Co., Milwaukee, Wis." In the other "Tip Top" takes the place of the word "Daisy."

Section 1 of the act of July 1, 1902, provides:

"That no person or persons, company or corporation, shall introduce into any State or Territory of the United States or the District of Columbia from any other State or Territory of the United States or the District of Columbia, or sell in the District of Columbia or in any Territory any dairy or food products which shall be falsely labeled or branded as to the State or Territory in which they are made, produced, or grown, or cause or procure the same to be done by others."

Section 2 makes a violation of the act a misdemeanor, punishable by a fine of not less than \$500 nor more than \$2,000.

In the opinion of September 20, after stating that the mere omission of the place of manufacture can not be said to constitute a violation of the law, and that the name of the wholesale dealer on the label or brand is not necessarily a representation that he is the producer or manufacturer of the goods, it was observed:

"Of course, if goods are manufactured or produced in one State, and the wholesale dealer is a resident of another, and the label or brand is so worded as to represent the dealer as the producer, there would be a violation of the law if such commodities were introduced into one State from another."

The S. Birkenwald Company, it is stated, purchase all their goods in Iowa. But the words, "Birkenwald's Daisy Sugar Corn, S. Birkenwald Co., Milwaukee, Wis.," clearly imply that the goods referred to are manufactured or prepared by that company in Wisconsin. The general public, unfamiliar with trade practices, would inevitably reach that conclusion. It seems to me, therefore, that these labels come within the statute as above construed. To hold otherwise would be to say that nothing short of direct and positive misrepresentation is inhibited. But that is more than the rule as to the strict construction of penal statutes can be said to require. The act in question aims to prevent the false labeling or branding of food and dairy products entering into interstate commerce. It does not, however, undertake to say what shall be held to constitute a false label or brand. Each case must therefore rest upon its own particular facts. But wherever the natural inference to be drawn from the form or words of a brand or label is contrary to the fact as to the State or Territory in which the article referred to is made, produced, or grown, the case would seem to be within both the letter and the spirit of the law.

The papers inclosed are herewith returned as requested.

Respectfully,

P. C. KNOX.

The SECRETARY OF AGRICULTURE.

---

NAMING THE BUREAUS IN THE DEPARTMENT OF COMMERCE AND LABOR.

The Secretary of Commerce and Labor is authorized, under the act of February 14, 1903 (32 Stat., 825), creating the Department of Commerce and Labor, to change the names of the Department of Labor, the Fish Commission, and other offices thereto assigned, as the business and good government of his Department requires.

DEPARTMENT OF JUSTICE,

*June 22, 1903.*

SIR: You desire to know whether or not you are authorized, under the act creating the Department of Commerce and Labor, to change the names of the offices of your Department; whether you have the authority, for example, to

designate the Fish Commission as the "Bureau of Fisheries," and the Department of Labor as the "Bureau of Labor."

I assume that the object of your question is to learn whether, for your own purposes as the head of the Department of Commerce and Labor, you have authority to designate the offices in question, and cause your subordinates to designate them in official communications by names other than those hitherto borne by such offices.

Congress has transferred to and made part of your Department a number of branches of the public service, some of which have been parts of other departments and others independent. They will acquire new relations to each other and with regard to you and the Department as a whole. They are placed under your control, and section 161 of the Revised Statutes provides:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

If the new relations acquired by these branches of business and the good government of the Executive Department you are expected to organize for the efficient execution of the laws require, in your opinion, the employment of certain names, I know of no statute or rule of law which forbids. Congress has not seen fit to so hamper a co-ordinate branch of the Government. Its own use of names is not such a prohibition. There is no legal objection to the employment of two names or many names for the same object, nor will it be "inconsistent with law" for you to make use of other names than those used by Congress. Names are ordinarily free for the person speaking or writing to choose, and I do not think that Congress, in entrusting you with certain machinery to be employed in executing the laws, desired to restrict your freedom in designating the divisions of what was of course intended to be an organized Executive Department and not a mere gathering together of distinct institutions.

The Department of Labor, which you mention, was originally a bureau. Congress raised it to the position of an independent department and gave it a name appropriate to such position. Congress has now given it a different position and one which makes its name, in the sense in which Congress used it, a clear misnomer. It is now no longer a department in that sense and it can hardly be supposed that Congress intended it to be designated and designated *only* as the Department of Labor of the Department of Commerce and Labor, the words "department of labor" acquiring the new meaning of a division or bureau of the new Department.

The "Fish Commission," also specially mentioned by you, as such, was never established by law. A commissioner's office and certain subordinate offices were created, and these are referred to by Congress as the "Fish Commission." Congress has now incorporated them in your Department, and their position in it was neither forbidden to be appropriately designated nor can it be supposed that Congress had any other expectation than that you would so designate it.

I therefore answer your question in the affirmative.

Respectfully,

P. C. KNOX.

THE SECRETARY OF COMMERCE AND LABOR.

---

CENSUS OFFICE APPROPRIATION.

The unexpended balance of the census appropriation referred to by the proviso in the act of March 3, 1903 (32 Stat., 1059), is available for census purposes, notwithstanding the specific appropriations made therefor by the act of February 25, 1903 (32 Stat., 896).

DEPARTMENT OF JUSTICE,

*June 23, 1903.*

SIR: In your letter of the 12th instant, inclosing one of the same date addressed to you by the Director of the Census, an opinion is requested respecting the availability for census purposes of the unexpended balance of a previous appropriation referred to by the proviso in the deficiency appropriation act of March 3, 1903.

This question might have been presented to the Comptroller of the Treasury under the act of July 31, 1894, section 8 (28 Stat., 208), which provides:

“Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement.”

Upon the passage of that act, this Department assumed the position, which it has ever since maintained, that, *except in matters of great importance*, questions of the character referred to therein should be submitted to the Comptroller, whose opinion is binding and conclusive and affords complete protection. (21 Opin., 178, 188, 530; 22 Opin., 413, 581; 23 Opin., 1, 2, 86, 431, 468, 586; 24 Opin., 85.)

The present question, however, is administrative in its nature and of sufficient importance to come within the exception stated. Its gravity is more than commensurate with that of the question considered by Mr. Olney (who first announced the rule referred to) in his opinion of May 23, 1895 (21 Opin., 181), and which related to the power of the several Executive Departments to purchase envelopes in cases of public exigency. Upon the availability of the balance referred to by the proviso in the act of March 3, 1903, as the letter of the Director indicates, depends the execution of a great deal of census work now in progress or contemplation and the retention or discharge of a considerable portion of his present force.

The proviso in the act of March 3, 1903 (32 Stat., 1059), thus presented for construction, is in these terms:

“The unexpended balance of the census appropriation, which by the proviso in the Act approved June twenty eight, nineteen hundred and two entitled ‘An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes,’ which was reappropriated and made available for continuing the work of taking the

Twelfth Census, and for all expenses arising under and authorized by the Act to provide for the permanent Census Office, approved March sixth, nineteen hundred and two, *be, and the same is hereby, made available for the purposes indicated in said proviso during the fiscal year, nineteen hundred and four*; and that said balance, or so much thereof as may be needed for the purpose, be, and the same is hereby, also made available for such expenditures as may become necessary in complying with the proclamation of the President, dated September thirtieth, nineteen hundred and two, pursuant to the provisions of section six of the Act of July first, nineteen hundred and two, entitled 'An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes,' including the cost of temporarily employing such number of persons as may be necessary for the performance of said work, at a compensation not to exceed that which has heretofore been paid employees in the Census Office for doing similar work, such persons to be selected and employed by the Director at such dates and for such periods of time as he may deem proper."

The proviso in the act of June 28, 1902 (32 Stat., 456), which was an act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1903, and for other purposes, referred to in the first clause of the proviso in the act of March 3, 1903, was as follows:

"Census Office: The unexpended balance of the appropriation made by the sundry civil appropriation Act approved March third, nineteen hundred and one, for salaries and necessary expenses for taking and compiling results of the Twelfth Census is hereby reappropriated and made available *for continuing the work of taking the Twelfth Census, and for all expenses, including cost of all printing, arising under and authorized by the Act to provide for a permanent Census Office*, approved March sixth, nineteen hundred and two, including the purchase of necessary law books, books of reference and periodicals, and manuscripts: *Provided*, That estimates in detail for the expenses of the permanent Census Office for the fiscal year nineteen hundred and four



and annually thereafter shall be submitted in the regular Book of Estimates."

The sundry civil appropriation act of March 3, 1901 (31 Stat., 1162), above referred to, made the following appropriation for census purposes:

"For salaries and necessary expenses for taking and compiling the results of the Twelfth Census, in accordance with the act of March third, eighteen hundred and ninety-nine, providing for the Twelfth and subsequent censuses, three million five hundred and sixteen thousand two hundred and ten dollars, to continue available until expended."

It thus appears that by the proviso in the act of June 28, 1902, referred to and in effect reenacted by the first clause of the proviso in the act of March 3, 1903, Congress made the unexpended balance of the original appropriation of over \$3,000,000, made by the act of March 3, 1901, "for salaries and necessary expenses for taking and compiling results of the Twelfth Census," available "for continuing the work of taking the Twelfth Census, and for all expenses, including cost of all printing, arising under and authorized by the act to provide for a permanent Census Office," including the purchase of necessary law books, etc.

The act of March 6, 1902 (32 Stat., 51), creating the permanent Census Office, and which is referred to in the proviso in the act of June 28, 1902, among other things provides:

"SEC 4. That there shall be in the Census Office, to be appointed by the Director thereof, with the approval of the head of the Department to which the said Census Office is attached, four chief statisticians, who shall be persons of known and tried experience in statistical work, at an annual salary of two thousand five hundred dollars each; a chief clerk, at an annual salary of two thousand five hundred dollars, who, in the absence of the Director, shall serve as acting director; a disbursing clerk, who shall also act as appointment clerk, at an annual salary of two thousand five hundred dollars; one stenographer, at an annual salary of one thousand five hundred dollars; four expert chiefs of division, at an annual salary of one thousand eight hundred dollars each; six clerks of class three; ten clerks of class two;

*and such number of clerks of class one, and of clerks, copyists, computers, and skilled laborers, with salaries at the rate of not less than six hundred dollars nor more than one thousand dollars per annum, messengers, assistant messengers, watchmen, and charwomen as may be necessary for the proper and prompt performance of the duties required by law."*

Section 7 of that act also provided that "for the purpose of securing the statistics required by this section the Director of the Census may appoint special agents when necessary, and such special agents shall receive compensation as hereinafter provided."

It will be observed that under the provisions of this act, the number of employees in the permanent Census Office under the grade of "class two," and of special agents appointed for the collection of statistics, is left to the discretion of the appointing power and limited only by the provision that they shall be "necessary for the proper and prompt performance of the duties required by law."

But it will also be observed that the proviso in the act of June 28, 1902, also contained a provision that "estimates in detail for the expenses of the permanent Census Office for the fiscal year 1904, and annually thereafter, shall be submitted in the regular Book of Estimates."

Upon the estimate of the expenses of his office for the fiscal year 1904, submitted by the Director in accordance with this provision, Congress made the following appropriations in the act of February 25, 1903 (32 Stat., 896) making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1904:

"Permanent Census Office: For the following now authorized and paid, during the fiscal year nineteen hundred and three, from appropriations for the Twelfth Census, namely: For Director, six thousand dollars; four chief statisticians, at two thousand five hundred dollars each; chief clerk, two thousand five hundred dollars; disbursing clerk, two thousand five hundred dollars; stenographer, one thousand five hundred dollars; four expert chiefs of division, at one thousand eight hundred dollars each; six clerks class three; ten clerks class two; two hundred and forty-nine

clerks class one; two hundred and four clerks, at one thousand dollars each; ninety copyists, at nine hundred dollars each; one clerk, seven hundred and twenty dollars; four skilled laborers, at one thousand dollars each; one skilled laborer, nine hundred dollars; one skilled laborer, eight hundred and forty dollars; one skilled laborer, seven hundred and eighty dollars; one skilled laborer, seven hundred and twenty dollars; ten watchmen, at seven hundred and twenty dollars each; six messengers, at eight hundred and forty dollars each; thirteen assistant messengers, at seven hundred and twenty dollars each; fifteen unskilled laborers, at seven hundred and twenty dollars each; thirty-five charwomen, at two hundred and forty dollars each; in all, six hundred and eighty-five thousand eight hundred and sixty dollars.

“For special agents to secure information for special reports, and expenses of the same one hundred and sixty thousand dollars.

“For rental of quarters, twenty-six thousand six hundred dollars.

“For stationery, ten thousand dollars.

“For furniture, carpets, ice, lumber, hardware, dry goods, advertising, telegraphing, expressage, horses and wagons, feed for and shoeing of horses, diagrams, awnings, shelvings, file cases, file holders, office furniture, fuel, light, and other absolutely necessary expenses, fifteen thousand dollars.

“For purchase of law books, books of reference, periodicals, and manuscript investigation of census work in other countries, five thousand dollars.

“For transcript of registration records, fourteen thousand dollars.

“For rent of tabulating machines, ten thousand dollars.”

This act, it will be observed, besides providing for the salaries of those employees in the permanent Census Office whose number is particularly set forth in section 4 of the act of March 6, 1902, creating that office, specifies the exact number of that large class of employees below “class two” whose appointment by the section referred to had been committed to the discretion of the appointing power. The act

also appropriates a certain amount for the employment of special agents and for the rental of quarters and other expenses of the office.

The question suggested, therefore, and about which doubt has arisen, is whether the authority of the Director of the Census to employ assistance and incur expenses is controlled and determined by the provisions of this act. Undoubtedly that would be the fact if there had been no further legislation by Congress on the subject. But although Congress, by requiring an estimate in detail to be submitted for the expenses of the permanent Census Office for the fiscal year 1904 and annually thereafter, and by making specific appropriations for such expenses based upon that estimate, evidently intended to limit and restrict the powers conferred upon the Director by the act of March 6, 1902, still the proviso in the subsequent act of March 3, 1903, amounts to a modification of that intention so far as the fiscal year 1904 is concerned; for that proviso, which seems susceptible of but one construction, makes the unexpended balance of the appropriation therein referred to available for all the purposes authorized by the act creating the permanent Census Office. The authority conferred upon the Director by the act of March 6, 1902, is necessarily dependent for its exercise upon the action of Congress in appropriating money therefor; but a failure to appropriate or a limited appropriation does not repeal the grant in whole or in part. The authority still exists, and may be exercised, whenever provision is made therefor; and even if it could be said to be repealed by the terms of one appropriation (though the act of February 25, 1903, contains no intimation to that effect) it might, of course, be subsequently reenacted.

The action of Congress in making the unexpended balance referred to by the proviso in the act of March 3, 1903, available for census purposes appears to have been prompted by the fact, stated in the letter of the Director, that a good deal of census work was then in progress or contemplation which was not and could not have been foreseen when his predecessor made his estimate of the force that would be needed for the ensuing year, upon which the appropriations

made by the act of February 25, 1903, were based. "As a result of these conditions," he adds, "the services of all the employees whose names are now on the rolls could be utilized to advantage for some time to come, and perhaps during the entire fiscal year, in view of the President's proclamation imposing upon this office the work of compiling the Philippine census returns and of the additional statistical work which is to be transferred to this office under the provisions of the act establishing the Department of Commerce and Labor."

By the second clause of the proviso in question the unexpended balance referred to in the first clause is expressly made available for the Philippine census work referred to in the proclamation of the President to which the Director alludes. The first clause would therefore be meaningless unless it referred to and authorized other expenditures.

I accordingly answer your question to the effect that the unexpended balance of the census appropriation referred to by the proviso in the act of March 3, 1903, is available for census purposes, notwithstanding the specific appropriations made therefor by the act of February 25, 1903.

Respectfully,

W. A. DAY,

*Assistant to the Attorney-General.*

Approved:

P. C. KNOX.

THE SECRETARY OF THE INTERIOR.

---

#### IMMIGRATION LAWS—CHINESE EXCLUSION—CONTAGIOUS DISEASE.

A Chinese person suffering from a dangerous contagious disease belongs to one of the classes of aliens which should be excluded from the United States under the provisions of the immigration act of March 3, 1903 (32 Stat., 1213).

The object of the proviso in section 36 of the above-named act was to prevent a misinterpretation of the repealing clause in that section, and to forestall any attempt to secure the admission of Chinese theretofore prohibited, from entering the United States under a claim that this act was intended to contain all provisions regulating the immigration of aliens, and that it expressly repealed the Chinese-exclusion laws.

DEPARTMENT OF JUSTICE,

*June 24, 1903.*

SIR: I have the honor to acknowledge the receipt of your communication of June 11, 1903, wherein you request an expression of my views as to the applicability to persons of Chinese descent of "An act to regulate the immigration of aliens into the United States," passed by the Congress and approved March 3, 1903.

It appears from your communication and the papers therewith submitted, that one Wong Joe Jun, a Chinese passenger on the steamship *Siberia*, arrived at the port of San Francisco May 15, 1903, and applied to the collector of customs for landing on the ground that he is the minor son of a Chinese merchant domiciled, resident, and engaged in business in San Francisco; that shortly after his arrival the applicant was examined by a medical officer of the Marine-Hospital Service, who certified that he was afflicted with trachoma, a dangerous contagious disease; that a board of special inquiry, convened under the general immigration law, approved March 3, 1903, likewise decided the applicant was afflicted with such disease and was, therefore, not entitled to admission into the United States under the provisions of said act, and that he was thereupon ordered deported.

The primary object of the act in question is to exclude from the United States aliens, irrespective of their rank or pursuit, whose presence would be dangerous to the public welfare; and to this end stringent regulations are provided. Its general terms and purposes include all aliens whose disabilities bring them within the classes of undesirables therein specified, and, unless excluded from its operation by the proviso contained in section 36, persons of Chinese descent are clearly within its provisions and must be treated as other aliens.

Section 36 is as follows:

"That all acts and parts of acts inconsistent with this act are hereby repealed: *Provided*, That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent."

One of the classes of persons intended to be excluded from the United States by this act is composed of "aliens afflicted with a loathsome or with a dangerous contagious disease." There is nothing in the laws specially relating to the immigration of Chinese persons providing for the exclusion of a merchant or member of any other excepted class, although he may be suffering from a loathsome or dangerous contagious disease; and unless the act now under consideration is applicable to him, such person may enter the United States with impunity and the public must suffer the consequences. I can see no valid reason for concluding that the Congress intended, by the proviso in question, to imperil the public safety by allowing a diseased person, because of his Chinese descent, to enter, when the very law in which this proviso appears has, as one of its special purposes, the further and more effective protection of the public from the evil consequences to be expected as a result of the presence of one so afflicted, and to this end prescribed his exclusion. The history of our laws relating to Chinese immigration forbids the conclusion that the coming of any persons of that nation into the United States was regarded as more to be desired than that of other aliens, or that special favors were intended to be shown them.

To admit a Chinaman known to be suffering from a contagious disease, when another alien not so descended would be excluded because afflicted with the same disease, would to that extent defeat the legislative intent made clear by the terms of the act and apparently lead to unjust and unexpected results. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention and, if possible, so as to avoid an unjust and absurd conclusion." (*Lau Oo Biew v. U. S.*, 144 U. S., 47.)

I am unable to conclude that the proviso in section 36, above quoted, was intended to entirely prohibit the application of said act to persons of Chinese descent. The object of this proviso, I think, was to prevent a misinterpretation of the repealing clause in the same section and to forestall any attempt to secure the admission of Chinese theretofore

prohibited, from entering the United States under a claim that this act alone was intended to contain all provisions regulating the immigration of all aliens and expressly repealed all laws in conflict therewith—the Chinese-exclusion laws among them. The language of this proviso is radically different from “that this act shall not apply to Chinese persons,” the terms used in the act of March 3, 1893, and this change in language is indicative of a like change of purpose.

I therefore advise you that Wong Joe Jun, the applicant for admission, if found to be suffering from a dangerous contagious disease in the way specified in the act, belongs to one of the classes of aliens which should be excluded from the United States under the terms and provisions of the act of March 3, 1903, regulating immigration.

I return herewith the inclosures of your letter, as requested.

Very respectfully,

P. C. KNOX.

THE SECRETARY OF THE TREASURY.

---

RANK AND PAY OF RETIRED OFFICERS OF THE MARINE  
CORPS.

Section 11 of the act of March 3, 1899 (30 Stat., 1007), which fixes the rank and pay of retired officers of the Navy, does not apply to officers of the Marine Corps.

DEPARTMENT OF JUSTICE,  
*June 26, 1903.*

SIR: I have the honor to acknowledge the receipt of your communication of June 23, 1903.

It appears that Col. James Forney, of the U. S. Marine Corps, has made application to the President to be placed on the retired list of such corps with the rank of brigadier-general, in accordance with the provisions of section 11 of “An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States,” approved March 3, 1899. He represents that he has served continuously in said corps since March 1, 1861, and that his



record is a creditable one. For your guidance in disposing of this application you ask my opinion as to whether section 11 of the act referred to applies to officers of the Marine Corps.

The act of March 3, 1899 (30 Stat., 1007), was evidently drafted with care and with a clear understanding of the distinctions between the Navy and the Marine Corps. The first seventeen sections, in definite terms, apply to the Navy; then follow the sections which, with equal exactness, apply to the Marine Corps. These two arms of the service are recognized and treated throughout the entire statute as separate and distinct, and for each of them appropriate provision is made.

Section 11 reads:

“That any officer of the Navy, with a creditable record, who served during the civil war, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade.”

The intention of the Congress, as expressed in the language of the act, must guide in its interpretation. The mere fact that one set of officers, not mentioned, are as meritorious as those expressly provided for, can not justify a construction liberal enough to give to the former benefits granted in clear terms only to the latter.

The unambiguous language of section 11 makes it apply only to officers of the Navy, and there is nothing within the entire act which in any way indicates that any officer not in the Navy was intended to be included within the provisions of such section.

I am therefore of the opinion that section 11 does not apply to officers of the Marine Corps, and have the honor to so advise you.

I return herewith the inclosures contained in your letter.

Respectfully,

P. C. KNOX.

THE SECRETARY OF THE NAVY.

## INDEX--DIGEST.

[See also Index to Subjects, p. xiii.]

### **ALIENS.**

**Right of Master of Foreign Vessel to Shackel Alien in Port of the United States.**—The master of a foreign vessel has a right, under the laws of the United States, to put in irons an alien on board his ship who is not allowed by law to enter the United States, in order to prevent such person from unlawfully landing; but this may be done only in exceptional cases and where nothing less will prevent the landing of such person. 531.

**ALIEN CONTRACT LABOR LAWS.** See CHINESE, 13, 15.

**AMERICAN ARTIST.** See CUSTOMS LAWS, 15.

### **AMERICAN EPHEMERIS AND NAUTICAL ALMANAC.**

**Number of Copies Authorized to be Printed.**—The Secretary of the Navy is authorized, under existing law, to cause to be printed 2,500 copies of the American Ephemeris and Nautical Almanac, and 3,182 copies of "the papers supplementary thereto;" and of the American Nautical Almanac, such "additional" copies thereof as he may determine necessary "for the public service and for sale to navigators and others." 663.

**AMERICAN NAUTICAL ALMANAC.** See AMERICAN EPHEMERIS AND NAUTICAL ALMANAC.

**APPOINTMENT.** See ARMY OFFICERS, 1, 6; PRESIDENT, 1.

### **APPRAISER OF CUSTOMS AT PITTSBURG, PA.**

**Revival of the Office.**—The office of appraiser of customs in the collection district of Pittsburg, Pa., having been abolished in 1880 by the Secretary of the Treasury, under the authority conferred upon him by section 2653, Revised Statutes, that officer has no authority to revive it. By abolishing the office the Secretary exhausted all his power in the premises, and Congress alone can re-create it. 613.

### **APPROPRIATIONS.**

**Act of March 3, 1903 (32 Stat., 1059)—Census Office.**—The unexpended balance of the census appropriation referred to by the proviso in the act of March 3, 1903 (32 Stat., 1059), is available for census purposes, notwithstanding the specific appropriations made therefor by the act of February 25, 1903 (32 Stat., 896). 699.

**ARMY OFFICERS.**

1. **Appointment.—Indirect Dismissal.**—Where A, an officer in the military service of the United States, was dismissed pursuant to the sentence of a general court-martial, which court, as it afterwards appeared, had no jurisdiction over the officer, and B was nominated to take his place on a certain date, "vice A, dismissed," which nomination was confirmed by the Senate, the appointment of B operated to supersede A, who ceased to be an officer after the date on which that appointment took effect. 89.
2. **Relative Jurisdiction of Civil and Military Courts in Philippine Islands.**—An officer in the Army of the United States who, while operating in the Philippines during the insurrection in those islands, and while the government of military occupation was in force therein, committed an offense against a native of those islands, was amenable only to the laws of war, and can not be tried by the civil courts of those islands or of the United States; and, having left the military service, he can not now be tried for the offense by a military court. 570.
3. **Same.**—A court-martial has no jurisdiction over an officer after he has left the service, and a military commission has no jurisdiction to try such officer now that peace has been proclaimed in the Philippines. *Ib.*
4. **Relative Rank.—Promotions.**—The mere promotion of two officers in different departments of the Army does not, under sections 1603 and 1219, Revised Statutes, disturb their preexisting relative rank. 74.
5. **Same.**—Section 1219, Revised Statutes, does not purport to regulate merely the relative rank of officers in the same department of the Army, but is intended to fix the relative rank of the various officers of different departments of the Army. *Ib.*
6. **Same.**—There is no warrant, therefore, for holding that promotions are appointments where the officers promoted are in different departments of the Marine Corps, but are not appointments where they are in the same department. *Ib.*

**ASSAY.** See CUSTOMS LAWS, 23, 24.

**ATTORNEY-GENERAL.—OPINIONS.**

1. **Hypothetical Questions.—Questions involving Discretion and Judgment.**—The Attorney-General declines to express an opinion upon the question whether the Postmaster-General should enter into a contract with the Return Postage Clearing Company for the institution of the "reply envelope and postal card" scheme, for the reason that the question is hypothetical in its nature and involves considerations of administrative discretion and judgment, and of practicability and advisability, which must be determined solely by the Postmaster-General. 118.
2. **Matters for Judicial and not Executive Determination.**—The Attorney-General can not properly pass upon the question whether

**ATTORNEY-GENERAL.—OPINIONS—Continued.**

the courts in this country have authority to execute letters rogatory issued out of the German patent office, as that is a matter for judicial and not for executive determination. 69.

3. **Payments out of the Treasury.**—It is not deemed necessary or desirable for the Attorney-General to express an opinion upon the question of granting extra compensation in lieu of annual leave to certain former employees of the Census Office, under a proviso to the deficiency appropriation act of June 30, 1902 (32 Stat., 571), that being a matter relating solely to payments out of the Treasury. By section 8 of the act of July 31, 1894 (28 Stat., 208), it is made the duty of the Comptroller of the Treasury to determine such questions. 85.
4. **Same—Power of Refund.**—The Comptroller of the Treasury, rather than the Attorney-General, should pass upon the question of the power of refund and payment out of the Treasury of duty overpaid on an importation of merchandise. Opinions of March 26, 1901 (23 Opin., 431), and July 20, 1901 (23 Opin., 468), followed. 553.
5. **Question not Predicated upon a Case Actually Arising.**—The Attorney-General declines to express an opinion upon the question whether the joint resolution of July 1, 1902 (32 Stat., 750), construing the pension act of June 27, 1890 (26 Stat., 182), has any retroactive force, for the reason that the question is not predicated upon an actual case arising in the Interior Department, and for the further reason that that Department has an officer clothed with authority to determine questions of that nature in the first instance, coming up on appeal from the Pension Bureau. 556.
6. **Same.**—The settled policy of the Department is that no opinion should be rendered upon any question of law unless it is specifically formulated in a case actually arising in the administration of a Department, and accompanied by a statement or finding of the facts involved. 59.
7. **Question Committed to Judicial Review.**—Nor will the Department consider any question committed to judicial review. To do so might bring it into conflict with a judicial tribunal. *Ib.*
8. **The conclusions of a Federal court,** until reversed by a higher court, are binding upon the Attorney-General. *Ib.*
9. **Question once Definitely Answered.**—The principle announced in the opinion of Attorney-General Olney (21 Opin., 23), that "a question once definitely answered by a former Attorney-General and left at rest for a long term of years should be reconsidered only in a very exceptional case," concurred in. 53.
10. **Statement of Facts must Accompany Request.**—It is the invariable rule of the Department of Justice to decline to give an opinion except when the request is accompanied by a statement or finding of the facts involved. 102.

**ATTORNEY'S FEES.** See LOYAL CREEK CLAIMS.

**BILLS OF LADING.** See INTERNAL REVENUE, 5.

**BOWMAN ACT.** See CLAIMS, 2.

**CAMEL'S HAIR NOILS.** See CUSTOMS LAWS, 8.

**CENSUS OFFICE.**

1. **Appropriation act of March 3, 1903 (32 Stat., 1059).**—The unexpended balance of the census appropriation referred to by the proviso in the act of March 3, 1903 (32 Stat., 1059), is available for census purposes, notwithstanding the specific appropriations made therefor by the act of February 25, 1903 (32 Stat., 896). 699.
2. **Employment of Honorably Discharged Soldiers.**—The preference given honorably discharged soldiers of the United States by section 5 of the act of March 6, 1902 (32 Stat., 51), in the matter of employment in the Permanent Census Office, is not absolute and regardless of qualifications. Such preference is to be given if the person is equally qualified; but the appointing power still retains and must exercise its discretion and judgment in determining the fitness for the required work of the persons to be selected and retained. 64.
3. **Same—Standard of Fitness.**—To this end the Director of the Census may fix a reasonable standard of fitness, and guard it by reasonable regulations intended and calculated to secure an efficient permanent force. Such regulations may relate to age, experience, rating, proposed time of service, etc. *Ib.*
4. **Same.**—The preference given by the statute is one with respect to the place sought or held; but if a person of the preferred class fails to secure the place he seeks, or to retain the one he has, there is no obligation on the appointing power to create a vacancy by dismissing an efficient employee to give him another chance. *Ib.*
5. **Special Agents.**—The Director of the Census is authorized, under section 7 of the act of March 6, 1902 (32 Stat., 51), to employ special agents temporarily in the Census Office at Washington upon special work not clerical in its nature. 78.
6. **Same.**—The words "all employees of the Census Office" in section 5 of the above-named act can not be held to apply to special agents or other field employees who may be temporarily assigned to service in the Census Office. *Ib.*

**CERTIFICATE OF MERIT.**

1. **Enlisted Man—Military Service.**—The President may grant a certificate of merit to an enlisted man of the Army who has distinguished himself in the service and is recommended for such certificate by the commanding officer of his regiment or by the chief of the corps to which he belongs, notwithstanding the fact that he is not in the military service at the time his case reaches the President for consideration, and, if granted the certificate,

**CERTIFICATE OF MERIT**—Continued.

will be entitled to additional pay for the period intervening between the date of such service and the date of his discharge from the military service; but the President can not grant a certificate of merit if the recommendation therefor by the commanding officer or chief of his corps was made after the enlisted man was discharged from the military service. 127.

2. **Enlisted Men of the Marine Corps.**—Section 1216, Revised Statutes, as amended (act of March 29, 1892, 27 Stat., 12), which empowers the President to grant a certificate of merit to an enlisted man of the Army who has distinguished himself in the service and has been recommended therefor by the commanding officer of the regiment or the chief of the corps to which such man belongs, applies only to enlisted men of the Army, and not to members of the U. S. Marine Corps who have been similarly commended. 579.

**CESSIONS OF LAND TO THE UNITED STATES.** *See STATE*  
CESSIONS OF LAND TO THE UNITED STATES.

**CHIEF CLERK OF WAR DEPARTMENT.** *See WAR DEPART-*  
MENT, 1, 2.

**CHIEF OFFICER OF CUSTOMS.** *See CUSTOMS LAWS, 22.*

**CHINA.** *See MILITARY SUPPLIES.*

**CHINESE.**

1. **Agents Appointed by Secretary of the Treasury to Aid in Enforcing Chinese Exclusion Laws.**—Section 2 of the act of April 29, 1902 (32 Stat., 176), which empowers the Secretary of the Treasury, with the approval of the President, to appoint such agents as he may deem necessary for the efficient execution of the Chinese treaty and Chinese exclusion laws, does not repeal by implication the provisions of the various previous acts in relation to the exclusion of Chinese, vesting in the collector of customs and his deputies the power to enforce the provisions of those laws, but is to be regarded as additional legislation on the subject and in harmony therewith. 561.
2. **Same.**—The agents to be appointed by the Secretary of the Treasury under the above-named act are not to supersede the collectors in the performance of their duties regarding the admission of Chinese, but constitute an additional force to act in cooperation with them in securing an effective enforcement of the law. *Ib.*
3. **Immigration Laws—Dangerous Contagious Diseases.**—A Chinese person suffering from a dangerous contagious disease belongs to one of the classes of aliens which should be excluded from the United States under the provisions of the immigration act of March 3, 1903 (32 Stat., 1213). 706.
4. **Same.**—The object of the proviso in section 36 of the above-named act was to prevent a misinterpretation of the repealing clause in

**CHINESE—Continued.**

that section and to forestall any attempt to secure the admission of Chinese theretofore prohibited from entering the United States under a claim that this act was intended to contain all provisions regulating the immigration of aliens, and that it expressly repealed the Chinese exclusion laws. *Ib.*

5. **Returning Registered Chinese Laborer.**—Circular No. 52, Bureau of Immigration, Treasury Department, issued May 10, 1902, providing that duly registered Chinese laborers seeking admission to the United States after temporary absence under Article II of the treaty of 1894 between the United States and China must prove that some one of the conditions mentioned in that article exists at the time of application for readmission, is warranted both by the treaty with China and by the existing laws of the United States. 91.
6. **Same.** The facts which entitle such Chinese laborer to return to this country must exist not only at the time of his departure but also at the time of his return, and this notwithstanding the fact that he has obtained a return certificate. *Ib.*
7. **Same—Debts "Pending Settlement."**—An open book account of over \$1,000 of a registered Chinese laborer seeking to return to this country, with a Chinese debtor, the existence of which account has been established, is one "pending settlement" under Article II of the treaty with China of December 8, 1894 (28 Stat., 1210), and is one "unascertained and unsettled" within the meaning of section 6 of the act of September 13, 1888 (25 Stat., 476). 637.
8. **Same.**—The term "pending settlement" may mean more than "pending payment;" it may include ascertainment. The word "settlement" in legal use embraces both ideas—the idea of discharging an obligation by payment, and the idea of arriving at its amount by ascertainment and adjustment. *Ib.*
9. **Return Certificate.**—A Chinese person possessing a "certificate of residence" as a person other than a laborer, issued to him under the provisions of the act of May 5, 1892 (27 Stat., 25), is not entitled thereby to the "return certificate" provided for in Article II of the treaty with China of December 8, 1894 (28 Stat., 1210), as that article applies only to registered Chinese laborers. 132.
10. **Same.**—The act of April 29, 1902 (32 Stat., 176), extending the provisions of the Chinese exclusion laws, and expressly reenacting section 7 of the act of September 13, 1888 (25 Stat., 477), continued existing laws only "so far as the same are not inconsistent with treaty obligations." 544.
11. **Same—Certificate of Disability.**—As heretofore held by this Department (21 Opin., 357; 23 Opin., 545), Article II of the treaty with China of 1894 displaced the provisions of section 7 of the act of 1888 with regard to the certificate of disability which

**CHINESE—Continued.**

must be presented by a registered Chinese laborer returning to the United States after an absence of more than one year. *Ib.*

12. **Transfer of Chinese Crew in Port of the United States.**—A Chinese crew which shipped at Hongkong on a vessel belonging to a company chartered under the laws of the United States, for a trip to San Francisco and return by the same vessel or any other vessel belonging to that company, which crew, owing to an accident to the ship, was brought to San Francisco on a vessel belonging to a different company, may be transferred to another vessel substituted for the one injured, after having duly signed for that service before a United States shipping commissioner. 111.
13. **Same.**—Such transfer would not be a violation of the alien contract labor laws. *Ib.*
14. **Same.**—The landing of the crew, temporarily, for the purpose of transfer, would not violate the treaty with China and the laws of the United States in relation to the exclusion of Chinese. *Ib.*
15. **Same.**—The Chinese exclusion laws and the alien contract labor laws have no application to seamen who, in good faith, are engaged in navigation, and who are temporarily within a port of the United States for that purpose. The transfer of the Chinese crew of the Danish steamer *Arab* to the Danish steamer *Stanley Dollar*, and of a Chinese crew from a vessel of the Pacific Mail Steamship Line to the steamer *Siberia*, of the same line, under the conditions named, would not involve a violation of either of those laws. 553.
16. **Head Tax—Trans-shipment in Port of the United States.**—The mere transfer from one vessel to another in a port of the United States, of alien Chinese passengers en route to their destination in a foreign country, does not subject such persons to the payment of the "head tax" or duty prescribed by section 1 of the act of August 3, 1882 (22 Stat., 214), as amended by the act of August 18, 1894 (28 Stat., 391). 590.

**CHOCTAW INDIANS.** See INDIANS.**CITIZENSHIP.**

**American Artist—Citizen of Porto Rico.**—A native Porto Rican, an artist by profession, although temporarily living in France on the 11th day of April, 1899, is, under section 7 of the act of April 12, 1900 (31 Stat., 79), a citizen of Porto Rico, and, as such, is an American artist, whose paintings upon importation into the United States are entitled to the privileges provided in paragraph 703 of the tariff act of July 24, 1897 (30 Stat., 203). 40.

**CIVIL SERVICE.**

1. **Department of State—"Temporary Typewriters and Stenographers."**—Section 3 of the legislative, executive, and judicial appropriation act of April 28, 1902 (32 Stat., 120, 171), did not operate to place in the classified service certain stenographers and a laborer who had been employed by the Department of



**CIVIL SERVICE**—Continued.

State since 1898 under succeeding yearly appropriations providing \$2,000 annually "for temporary typewriters and stenographers" in that Department, the same "to be selected by the Secretary." 95.

2. **War-Emergency Employees.**—That provision applied only to war-emergency employees who had been repeatedly recognized, designated, and continued in employment in yearly appropriation acts as an "additional temporary force rendered necessary because of increased work incident to the war with Spain." *Ib.*
3. **Transfer of Temporary Clerks to Classified Service.**—Section 3 of the act of April 28, 1902 (32 Stat., 120, 171), which provides for the transfer to the classified service of the Government of certain temporary positions which were created to meet the exigencies of the war with Spain, exempts from examination such employees as filled these positions at the time of the passage of the act, and transfers the positions in question to the classified service. Subsequent vacancies must be filled in accordance with the laws and regulations governing appointments to the civil service. 81.
4. **Reinstatement of Temporary Clerk to Position in Classified Service.**—A person formerly employed as a clerk in the temporary or Spanish war force, who resigned September 30, 1901, can not, by virtue of section 3 of the act of April 28, 1902 (32 Stat., 120, 171), which transferred these temporary positions to the classified service, be reinstated without examination. 103.
5. **Same—Rule 9, Civil-Service Regulations.**—The question whether such person is eligible to be reinstated under rule 9 of the Civil-Service Regulations depends upon the date of the requisition. If the position was within the classified service at the date of the requisition, then such person is eligible. *Ib.*
6. **Same.**—The word "may" in rule 9 vests a discretion in the Commission. The question of reinstatement is one of administrative discretion, and is not to be granted except when consistent with the interests of the public service. *Ib.*
7. **Solicitation of Political Contributions by Federal Officers.**—The sending of a circular letter by a political committee to Federal officers and employees, soliciting financial aid in Congressional or State elections, upon or attached to which appear the names of Federal officers or employees, is a violation of section 11 of the civil-service act (act of January 16, 1883; 22 Stat., 406), which declares that no officer or employee of the Government shall be in any manner concerned in soliciting or receiving any assessment or contribution for any political purpose whatever from any officer or employee of the United States. 133.
8. **Same.**—The statute unquestionably condemns all such circulars notwithstanding the particular form of words adopted in order to show a request rather than a demand and to give the responses a quasi-voluntary character. 134.

**CLAIMS.**

1. **Disallowances by Treasury Department—Court of Claims.**—Where, upon an appeal to the Comptroller of the Treasury from certain disallowances made by the Auditor for the War Department in the settlement of the accounts of a disbursing officer of the Army, the Comptroller is unable, because of disputed questions of fact, to determine the question presented, and certifies such fact to the Secretary of the Treasury, the latter officer has no authority, under section 1063, Revised Statutes, to direct that the matter be referred to the Court of Claims for trial and adjudication, it not being a claim within the meaning of that section. 545.
2. **Same—Bowman Act.**—In its present status, it is such a matter as is contemplated by section 2 of the Bowman Act (22 Stat., 485). Under the latter section, provision is made for advisory action only without the entry of judgement, while by section 1063, Revised Statutes, the court must have jurisdiction of the matter so as to be able to render judgement therein. *Ib.*

**COAL CONTRACT FOR POST-OFFICE DEPARTMENT.** *See*  
POST-OFFICE DEPARTMENT.

**COASTING TRADE.** *See* VESSELS.

**COLLECTORS OF CUSTOMS.** *See* CHINESE, 1, 2.

**COMMERCE.** *See* MILITARY SUPPLIES; NEUTRALITY, 3, 4.

**COMPTROLLER OF THE TREASURY.** *See* ATTORNEY-GENERAL—  
OPINIONS, 3, 4.

**COMPULSORY TESTIMONY.**

1. **Licensed Officer of Steam Vessel.**—A licensed officer of a steam vessel, duly summoned to give testimony in a hearing before a board of United States local inspectors of steam vessels, who refuses to answer questions which are, in the opinion of the board, material and proper, may be compelled to answer, under the penalty of suspension or revocation of his license, or otherwise. 136.
2. **Same—Contempt.**—A refusal on the part of a witness to answer a proper question pertinent to the issue before a court is a contempt, and while this power may not be absolute in this special tribunal, which is not given the right to impose fines or imprisonment for disobedience to its authority, nevertheless the principle may be invoked so far as the special service and special discipline go. *Ib.*
3. **Same—May not Refuse to Answer on the Ground that it may Subject Him to a Penalty.**—Such licensed officer when charged with a violation of section 4449, Revised Statutes, and on trial before the above-named board on such charge, has no right to refuse to answer a question material to the inquiry upon the ground that his answer may subject him to the penalty provided in that section. *Ib.*

**COMPULSORY TESTIMONY**—Continued.

4. *Same*.—Section 4449, Revised Statutes, is a remedial, not a penal, statute, and the revocation of a license as therein provided may be viewed rather as a remedy to insure better efficiency in the Steamboat-Inspection Service than as a punishment for an offense committed. *Ib*.
5. *Same*.—May not Withhold Information and Remain in the Service.—Such licensed officers are engaged in a special service, peculiarly related to the Government; they are endowed with certain privileges and subject to certain burdens, and paramount considerations of the good of the service require that such an officer shall not be permitted to withhold any information material to an inquiry affecting the service and yet remain a member of that service. 137.

**CONDEMNATION.** *See* EMINENT DOMAIN.**CONFINEMENT OF CONVICT.** *See* PHILIPPINE ISLANDS, 11, 12.**CONSTITUTIONAL LAW.**

1. *Gifts from Prince or Foreign State*.—The provision of Article 1, section 9, clause 9 of the Constitution, which forbids the acceptance, without the consent of Congress, by any person holding any office of profit or trust under the United States, of any "present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state," applies as well to a titular prince as to a reigning one; and a simple remembrance of courtesy, even if merely a photograph, falls under the inclusion of "any present of any kind whatever." 116.
2. *Same*.—To a Department of the Government.—This prohibition expressly relates to official *persons*, and does not extend, under the circumstances outlined, to a department of the Government or to governmental institutions. 117.

**CONSULS.**

1. *Fees for Furnishing Inspection Cards—Unofficial Service*.—The President may prescribe a fee, as provided by section 1745, Revised Statutes, for the services of a consul in furnishing inspection cards to steerage passengers on vessels destined to the United States, as required by the quarantine regulations of April 1, 1903, but he has no authority to declare such a fee unofficial and to permit the consul to retain it as such. 672.
2. *Same*.—No service by a consul can be unofficial when the applicant has a right to demand it and the consul no right to refuse it. *Ib*.

**CONTAGIOUS DISEASES.** *See* IMMIGRATION.**CONTRABAND.** *See* NEUTRALITY, 2.**CONTRACT.**

*Dry Dock—Shoring*.—A contract for the building of a dry dock contained the provision that "the excavation shall be shored and protected from caving and injury in a manner which shall be

**CONTRACT—Continued.**

safe and sufficient, in the opinion of the engineer in charge.”  
*Held:* The Government has a right to require that the land adjacent to the excavation, lying between the dry dock and a quay wall, be protected from caving and injury. 82.

*See also* MAIL CONTRACT.

**CONTRACT LABOR.** *See* CHINESE, 13, 15.

**COURT OF CLAIMS.** *See* CLAIMS, 1.

**COURTS-MARTIAL.**

1. **Jurisdiction of Civil and Military Courts in Trial of Officer for Murder of Civilian, Philippine Islands.**—An officer in the Army of the United States who, while operating in the Philippines during the insurrection in those islands, and while the government of military occupation was in force therein, committed an offense against a native of those islands, was amenable only to the laws of war, and can not be tried by the civil courts of those islands or of the United States; and, having left the military service, he can not now be tried for the offense by a military court. 570.
2. **Same—Jurisdiction after Officer has left Service.**—A court-martial has no jurisdiction over an officer after he has left the service, and a military commission has no jurisdiction to try such officer now that peace has been proclaimed in the Philippines. *Ib.*

**CRUISER GALVESTON.** *See* JURISDICTION, 4.

**CUSTOMS LAWS.**

1. **Appraisement of Property Subject to Forfeiture for Smuggling, etc.**—When property subject to forfeiture for smuggling or cognate offenses is seized, the appraisement should be in accordance with Section 3074, Revised Statutes, and not under section 13 of the customs administrative act (26 Stat., 136). 583.
2. **Smuggling** is the actual passage of dutiable goods through the lines of the customs-house without paying or securing the payment of the duties thereon. *Ib.*
3. **Smuggled or Unentered Goods—Condition of Release.**—The purpose of the law as to smuggled or unentered goods requires the exaction of the so-called “home value” as the condition of release on payment of the appraised value, but not as implying the assessment of duties on such goods. *Ib.*
4. **Smuggled Goods** are to be associated with Prohibited Goods and are not liable to duty. The Government should, therefore, limit its action to forfeiture of the goods and prosecution of the offender. *Ib.*
5. **Amount Accepted in Lieu of Forfeiture Treated as a Fine and not as a Duty.**—Where, upon the seizure of smuggled or unentered goods, the Secretary of the Treasury, in the exercise of his power to remit fines and penalties, accepts in lieu of forfeiture the payment of such an amount as he deems just and equitable, the

**CUSTOMS LAWS—Continued.**

amount paid should be treated as a fine imposed rather than as a duty collected. *Ib.*

6. **The Power of the Secretary of the Treasury to Release and Remit Fines, Penalties, and Forfeitures** under sections 3081 and 5293, Revised Statutes, and under sections 17 and 18 of the act of June 22, 1874 (18 Stat., 189), now subject to the restriction of section 7 of the customs administrative act as amended (30 Stat., 212), relates only to civil liability and consequences where the value of the property seized or the amount of the fine or forfeiture incurred does not exceed \$1,000; but does not include penalties "accrued" or "incurred" which have been "adjudged" as part of the punishment under an "indictment." *Ib.*
7. **Collection of Duty on Goods Prohibited from Entry.**—The Treasury Department is not required by the statutes to levy and collect duty or its equivalent on goods the importation of which is specifically and absolutely prohibited. 556.
8. **Drawback—Camel's-hair Noils.**—The separation of imported camel's hair into "tops" and "noils" by combing, for the purpose of preparing the material for manufacture, does not result in such "noils" becoming a distinct manufactured article and entitled to drawback within the meaning of section 30 of the tariff act of July 24, 1897 (30 Stat., 211). 53.
9. **Same.**—The drawback law contemplates the manufacture of a separate and complete article which is not merely the finished material of a further stage. *Ib.*
10. **Same—Coal Imported and used as Fuel on Vessel Plying between New York and Honolulu.**—Honolulu is a Pacific port of the United States within the meaning of the tariff act of July 24, 1897 (30 Stat., 151, 190), and coal imported into the United States which is afterwards used for fuel on board a vessel propelled by steam plying between the ports of New York and Honolulu and registered under the laws of the United States, is entitled to drawback under paragraph 415 of that act. 6.
11. **Same—Cotton Bales—Burlaps.**—Imported burlaps, on which duty has been paid, when used as coverings on the so-called "round-lap" bales of cotton, are not, when reexported, entitled to drawback under section 30 of the tariff act of July 24, 1897 (30 Stat., 211), for the reason that the bale is not an article manufactured or produced within the meaning of that section. It is merely a package of material peculiarly constructed which may be resolved into covering and contents. 575.
12. **Duties in Cases of Forfeiture.**—Regular duties may be exacted on an importation of foreign goods, notwithstanding the goods have been seized and forfeited for a violation of section 9 of the customs administrative act of June 10, 1890 (26 Stat., 135), and the whole of the proceeds from their sale applied to the use of the United States. 1.

**CUSTOMS LAWS—Continued.**

13. **Duty on Steel Shaft Landed in United States for use on Foreign Vessel.**—A steel shaft can not be landed and kept on the dock of the Cunard Steamship Company in the United States, for possible use on the steamships *Etruria* and *Umbria* in case of emergency, without payment of duty thereon. 533.
14. **Free Entry of Philosophical and Scientific Apparatus.**—An instrument designed for the reproduction of artists' models, statuary, and decorative architecture, imported for the purpose of being temporarily exhibited as a philosophical or scientific apparatus for the promotion of industry in the United States, and to be exported within six months after its importation, may fairly be regarded as a "philosophical or scientific apparatus" within the meaning of paragraph 701 of the tariff act of July 24, 1897 (30 Stat., 203), and is entitled to be admitted free of duty. 28.
15. **Free Importation of Paintings of a native Porto Rican residing abroad.**—A native Porto Rican, an artist by profession, although temporarily living in France on the 11th day of April, 1899, is, under section 7 of the act of April 12, 1900 (31 Stat., 79), a citizen of Porto Rico, and, as such, is an American artist, whose paintings upon importation into the United States are entitled to the privileges provided in paragraph 703 of the tariff act of July 24, 1897 (30 Stat., 203). 40.
16. **Free Importation of Porto Rican Products.**—All articles of Porto Rican origin exported from Porto Rico to foreign countries after the passage of the Foraker act of April 12, 1900 (31 Stat., 77), may, since the proclamation of the President on July 25, 1901, doing away with the 15 per cent duty imposed under section 3 of that act, be imported into the United States free of duty under paragraph 483 of the tariff act of July 24, 1897 (30 Stat., 195), provided the articles have not been advanced in value or improved in condition by any process of manufacture or other means. 55.
17. **Same—Internal-Revenue Tax.**—Such free importation does not, however, affect the question of the payment of the internal-revenue tax provided for in section 3 of the Foraker act. *Ib.*
18. **Free Importation of Tobacco Grown in Porto Rico.**—Tobacco grown in Porto Rico after the cession of that island to the United States and brought into this country for warehousing, and afterwards exported to Canada and thence returned to the United States, is within the benefits of paragraph 483 of the act of July 24, 1897 (30 Stat., 195), but subject to the internal-revenue-tax provisions of section 3 of the act of April 12, 1900 (31 Stat., 77). 612.
19. **Importation of Goods Bearing Foreign Trade-Mark.**—The importation into the United States of an article bearing the genuine trade-mark of the maker, by an importer who is not the owner of the trade-mark, is not forbidden by section 11 of the tariff act of July 24, 1897 (30 Stat., 207), although such trade-mark

**CUSTOMS LAWS—Continued.**

has been properly registered in the United States and all rights thereunder have been transferred and belong to another party. 551.

20. *Same.*—The purpose of that section is twofold—to protect the domestic manufacturer against encroachment upon his trade-mark, and the public from the imposition of imported articles assuming domestic names. It is the simulation or counterfeit, and not reality or genuineness, at which the section is aimed. *Ib.*
21. *Informer's Compensation.*—Notwithstanding the absence of the certificate provided for by section 6 of the act of June 22, 1874 (18 Stat., 186), the Secretary of the Treasury is authorized, under section 4 of that act, to award compensation to a Canadian customs official who furnished information which resulted in a forfeiture of certain diamonds for violation of section 3082, Rev. Stat. 61.
22. *Same.*—“*Chief Officer of Customs.*”—A deputy collector of customs, with headquarters in the customs district of Vermont, but stationed for service at Montreal, Canada, is a “chief officer of customs” within the meaning of section 4 of the above-named act, which authorizes the payment of a reward for original information leading to the discovery of any fraud upon the customs revenue. *Ib.*
23. *Lead Bullion—Assay—Treasury Regulations.*—While paragraph 181 of the tariff act of July 24, 1897 (30 Stat., 166), which imposes a duty on imported lead ores, contemplates the determination of the quantity of metal in the ore by assay, by paragraph 182 of that act the determination of the quantity of metal contained in imported lead bullion is to be by official weighing only, and the application of assay to lead bullion under the current Treasury regulations for bonded smelters and refiners is without warrant of law. 45.
24. *Same.*—The Attorney-General declines to modify the views and conclusion expressed in his opinion of May 15, 1902 (*ante*, p. 45), that paragraph 182 of the tariff act of July 24, 1897 (30 Stat., 166), requires the quantity of metal contained in imported lead bullion to be determined by official weighing only, and that the application of assay to lead bullion under the current Treasury Regulations for bonded smelters and refiners is without warrant of law. 569.
25. *Same.*—The statutory percentages of refined metal for exportation may not properly be made up of “such portions of metals as the importer may determine.” *Ib.*
26. *Liquidation of Duties.*—Where, notwithstanding the instruction of the Secretary of the Treasury that collectors of customs should delay final liquidation of duties on certain merchandise until further orders, duties were nevertheless liquidated and subsequently reliquidated, *Held:* Such original liquidation was complete and subsisting until changed by reliquidation. 34.

**CUSTOMS LAWS—Continued.**

27. **Refund—Mistake of Fact.**—The authority of the Secretary of the Treasury to refund duties erroneously collected, on the ground of mistake, is to be restricted to mistake of fact. *Ib.*
28. **The question whether another country pays a bounty** on the exportation of sugar can not properly be called a pure question of fact. It is a question of mixed fact and law. *Ib.*
29. **Same—Common-law Mistake of Fact.**—A mistake in such a question does not arise upon an error of fact within the meaning of the concluding proviso to section 1 of the act of March 3, 1875 (18 Stat., 469), defined in 21 Opin., 224, to be a common-law mistake of fact. *Ib.*
30. **Removal and Destruction of Merchandise Held in Bond.**—Articles of merchandise imported into the United States and held in a bonded warehouse for use in the manufacture of articles for exportation in accordance with section 15 of the tariff act of July 24, 1897 (30 Stat., 207), may be removed from such warehouse and destroyed in the presence of an officer designated by the collector of the port and accounted for as waste, and the manufacturer relieved from the payment of duty thereon. 58.
31. **Secretary of the Treasury—Release of Goods Subject to Forfeiture.**—The Secretary of the Treasury may release cigars imported in violation of section 26 of the act of August 28, 1894 (28 Stat., 552), amending section 2804, Revised Statutes, on payment of a fine equal to the duty, when in his opinion the importation does not involve fraud. 588.
32. **Seizure and Destruction of Fur-seal Skins Unlawfully Imported.**—While collectors of customs and other revenue officers, under the direction of the Secretary of the Treasury, are the proper officers to seize and destroy fur-seal skins imported into the United States in violation of section 9 of the act of December 29, 1897 (30 Stat., 226), yet the usual proceedings for condemnation and forfeiture should be instituted in order to determine whether or not the seizure of such skins was justifiable and their destruction a necessary consequence. 577.
33. **Same—Authority of Collectors of Customs, etc.**—The authority of such officers to seize and destroy by summary action rather than under judicial proceedings is reached by implication, as the statute is not explicit upon that point. Where rights of person and property are involved, an implied authority which is summary and might be used arbitrarily should not be lightly assumed. In such cases the inference should not only be persuasive but irresistible. *Ib.*
34. **Storage Charges, etc., Collected in Porto Rico.**—Storage charges, fines, penalties, and forfeitures, and other collections, not duties or taxes, made by customs officers in Porto Rico in the administration of the customs laws, should be deposited to the credit of the Treasurer of the United States. 621.



**DAIRY AND FOOD PRODUCTS.** *See* FALSE LABELING OF DAIRY OR FOOD PRODUCTS.

**DANGEROUS CONTAGIOUS DISEASES.** *See* IMMIGRATION.

**DEPARTMENT OF AGRICULTURE.**

**False Labeling or Branding of Dairy and Food Products.**—The Department of Agriculture and the Treasury Department have no jurisdiction or power under the act of March 3, 1903 (32 Stat., 1157), to prevent or punish the false labeling or branding of dairy or food products after they have passed the custom-house and are delivered to the owner or consignee. 175.

**DEPARTMENT OF COMMERCE AND LABOR.**

**Naming the Bureaus in.**—The Secretary of Commerce and Labor is authorized, under the act of February 14, 1903 (32 Stat., 825), creating the Department of Commerce and Labor, to change the names of the Department of Labor, the Fish Commission, and other offices thereto assigned, as the business and good government of his Department requires. 697.

**DEPARTMENT OF JUSTICE.**

**Can do nothing to restrict the exportation of arms and warlike material to China during the present insurrectionary movements in that country.** 26.

**DEPARTMENT OF STATE.** *See* CIVIL SERVICE, 1.

**DEPARTMENTAL PRACTICE.** *See* ATTORNEY-GENERAL—OPINIONS, 6, 7.

**DESTRUCTION OF MERCHANDISE HELD IN BOND.** *See* CUSTOMS LAWS, 30.

**DISTRICT OF COLUMBIA.**

**Eviction of Unlawful Occupants of the Public Lands in.**—The only intent of section 1797, Revised Statutes, as amended by the act of April 28, 1902 (32 Stat., 152), is to empower the United States marshal of the District of Columbia to eject summarily transient or disturbing persons from the public grounds in the District under the direct supervision of the Chief of Engineers, and does not apply to occupants who have been in actual possession, under a claim of right, for a long period of years. In such cases the Government should apply to the courts to obtain possession. 616.

**DRAWBACK.** *See* CUSTOMS LAWS, 8-11.

**DRY DOCK.** *See* CONTRACT.

**DUTIES.** *See* CUSTOMS LAWS.

**EMINENT DOMAIN.**

1. **Philippine Insular Government—Land required by United States for Military Posts.**—A good title can be acquired by the United States to land in the Philippine Islands required for use as military posts under either section, 1 or 2, of the act of the Philippine Commission of March 5, 1903 (No. 665), the method

**EMINENT DOMAIN**—Continued.

provided by section 1 being slightly more circuitous than that provided by section 2, in that it provides for condemnation by the Philippine insular government and subsequent transfer to the United States. 640.

2. States may acquire Land by Condemnation for the Federal Government. Decision in the case of *Trombley v. Humphrey* (23 Mich., 472) held to be erroneous. *Ib.*
3. The Philippine government derives the power of eminent domain from section 63 of the organic act (32 Stat., 706). *Ib.*

**EMPLOYMENT OF HONORABLY DISCHARGED SOLDIERS.**

See CENSUS OFFICE, 2-4.

**ENTRY.** See VESSELS.

**EVICTIION.** See DISTRICT OF COLUMBIA.

**EXPORT BILLS OF LADING.** See INTERNAL REVENUE, 5.

**FALSE LABELING OF DAIRY OR FOOD PRODUCTS.**

1. Act applies to Articles Imported from Foreign Countries.—The act of July 1, 1902 (32 Stat., 632), prohibiting the introduction into any State or Territory of any dairy or food product which shall have been falsely labeled or branded as to the State or Territory where grown, applies not only to domestic articles, but also to those imported from foreign countries which are labeled as being of domestic origin. 675.
2. Same. The Department of Agriculture and the Treasury Department have no jurisdiction or power under the act of March 3, 1903 (32 Stat., 1157), to prevent or punish the false labeling or branding of dairy or food products after they have passed the custom-house and are delivered to the owner or consignee. *Ib.*
3. "Birkenwald's Daisy Sugar Corn."—The use of the words "Birkenwald's Daisy Sugar Corn, S. Birkenwald Co., Milwaukee, Wis.," by that company on canned goods produced in another State, is a violation of section 1 of the act of July 1, 1902 (32 Stat., 632), which prohibits the false labeling or branding of dairy or food products. These words clearly imply that the goods referred to were manufactured or prepared in Wisconsin. 695.
4. Rule of Interpretation.—Wherever the natural inference to be drawn from the form or words of a brand or label is contrary to the fact as to the State or Territory in which the article referred to is made, produced, or grown, the case would seem to be within the letter and spirit of the above-named act. *Ib.*
5. Omission of Place of Manufacture—Name of Wholesale Dealer.—The act of July 1, 1902 (32 Stat., 632), which prohibits the false labeling or branding of dairy and food products which enter into interstate commerce, does not provide that such products shall be labeled or branded so as to show the State or Territory in which they are produced. It provides merely that such products shall not be falsely labeled or branded as to the State or Territory in

**FALSE LABELING OF DAIRY OR FOOD PRODUCTS—Cont'd.**

which they are made, produced, or grown. The mere omission, in the instances given, of the place of manufacture can not be said to be in violation of that law; nor is the name of the whole sale dealer on the label or brand necessarily a representation that he is the manufacturer or producer. 125.

**FEDERAL BUILDING SITE IN HONOLULU.** *See* HAWAII, 2, 3.

**FEDERAL COURTS.** *See* LETTERS ROGATORY.

**FEES.** *See* CONSULS.

**FINES.** *See* CUSTOMS LAWS, 6, 31, 34.

**FOOD AND DAIRY PRODUCTS.** *See* FALSE LABELING OF FOOD AND DAIRY PRODUCTS.

**FOREIGN CABLE CONSTRUCTION SHIP.** *See* TONNAGE TAX, 2.

**FOREIGN TRADE-MARK.** *See* TRADE-MARK.

**FUR-SEAL SKINS.** *See* CUSTOMS LAWS, 32, 33.

**GENERAL APPRAISERS.**

1. **Incompatible Service.**—The provision in section 12 of the customs administrative act of June 10, 1890 (26 Stat., 136), directing that a general appraiser "shall not be engaged in any other business, avocation, or employment," is not applicable to the case of a general appraiser detailed by the Secretary of the Treasury, without additional compensation, as "an expert to represent the United States in the international commission for the conversion of the present Chinese tariff into specific rates." That provision, in connection with other provisions of the law, means that such officer can not hold another office under the Government, or be engaged in other incompatible Government service. 12.
2. **Same—Office.**—There is no incompatibility between the office of general appraiser and the special service of expert for which such officer was detailed, the latter service being a mere employment without compensation, and not an office. *Ib.*

*See also* TEA BOARD OF THE GENERAL APPRAISERS.

**GERMAN LETTERS ROGATORY.** *See* LETTERS ROGATORY.

**GIFTS FROM PRINCE HENRY OF PRUSSIA.** *See* CONSTITUTIONAL LAW.

**HAWAII.**

1. **Honolulu is a Pacific Port** of the United States within the meaning of the tariff act of July 24, 1897 (30 Stat., 151, 190), and coal imported into the United States, which is afterwards used for fuel on board a vessel propelled by steam plying between the ports of New York and Honolulu and registered under the laws of the United States, is entitled to drawback under paragraph 415 of that act. 6.

**HAWAII—Continued.**

2. **Public Lands of.**—The President is authorized, under section 91 of the Organic act of the Territory of Hawaii (31 Stat., 159), to take such of the public lands of Hawaii as he deems proper for the uses and purposes of the United States. 600.
3. **Acquisition of Federal Building Site in Honolulu.**—The Secretary of the Treasury may, if authorized by the President, accept a site for a Federal building in Honolulu acquired in exchange for public land in Hawaii and assume the custody and control thereof, no objection thereto arising under section 3736, Revised Statutes, or otherwise. *Id.*

**HEAD TAX.**

1. **Alien Passengers Brought into Porto Rico.**—The head tax upon alien passengers brought into ports of Porto Rico should be accounted for and credited to the "immigrant fund," as is done with like collections upon alien passengers arriving at ports in the United States. 86.
2. **Alien Passengers—Transshipped in Port of the United States.**—The mere transfer from one vessel to another in a port of the United States, of alien passengers en route to their destination in a foreign country, does not subject such persons to the payment of the "head tax" or duty prescribed by section 1 of the act of August 3, 1882 (22 Stat., 214), as amended by the act of August 18, 1894 (28 Stat., 391). 590.

**HONOLULU.** *See* HAWAII, 1.

**HONOLULU, FEDERAL BUILDING SITE.** *See* HAWAII, 3.

**HONORABLY DISCHARGED SOLDIERS.** *See* CENSUS OFFICE, 2, 3.

**IMMIGRANTS.** *See* ALIENS.

**IMMIGRANT FUND.** *See* PORTO RICO, 4.

**IMMIGRATION.**

1. **A Chinese Person Suffering from a Dangerous Contagious Disease** belongs to one of the classes of aliens which should be excluded from the United States under the provisions of the immigration act of March 3, 1903 (32 Stat., 1213), 706.
2. **Section 36 of the Act of March 3, 1903 (32 Stat., 1213).**—The object of the proviso in section 36 of the above-named act was to prevent a misinterpretation of the repealing clause in that section, and to forestall any attempt to secure the admission of Chinese theretofore prohibited, from entering the United States under a claim that this act was intended to contain all provisions regulating the immigration of aliens, and that it expressly repealed the Chinese-exclusion laws. *Id.*

**INCOMPATIBLE SERVICE.** *See* OFFICE.

**INDIRECT DISMISSAL.** *See* ARMY OFFICERS, 1.

**INDUCTION OF STATE MILITIA INTO THE MILITARY SERVICE OF THE UNITED STATES.** *See* MILITARY SERVICE OF THE UNITED STATES.

**INFORMER'S COMPENSATION.** *See* CUSTOMS LAWS, 21, 22.

**INSPECTION CARDS.** *See* CONSULS.

**INDIANS.**

**Identification of Part-blood Mississippi Choctaw Indians.**—Paragraph 41 of the agreement of March 21, 1902, between the United States and the Choctaw and Chickasaw tribes of Indians, ratified by act of Congress approved July 1, 1902 (32 Stat., 641), does not authorize the identification of part-blood children of Mississippi Choctaws who are themselves identified solely by reason of full blood. Such children must in some other way, if possible, establish their claims to participate in the benefits arising from the treaty of September 27, 1830 (7 Stat., 333), between the United States and the Choctaw Nation. 689.

**INTERNAL REVENUE.**

1. **Cigars Shipped from the Philippine Islands** to the United States are subject to internal-revenue tax under section 3402, Revised Statutes. 120.
2. **Same.**—Prior to the passage of the act of July 1, 1902 (32 Stat., 691), the Philippine Islands were "within the exterior boundaries of the United States" within the meaning of section 3448, Revised Statutes, and subject to its provisions; but since its passage the provisions of that section have been inoperative in those islands, section 1 of that act providing in effect that the laws of the United States shall *not* apply to the Philippine Islands. No internal-revenue tax therefore can be imposed under the laws of the United States on cigars shipped into this country from the Philippine Islands. *Ib.*
3. **Importation of Tobacco Grown in Porto Rico.**—Tobacco grown in Porto Rico after the cession of that island to the United States and brought into this country for warehousing, and afterwards exported to Canada and thence returned to the United States, is within the benefits of paragraph 483 of the act of July 24, 1897 (30 Stat., 195), but subject to the internal-revenue tax provisions of section 3 of the act of April 12, 1900 (31 Stat., 77). 612.
4. **The Free Importation of Articles of Porto Rican Origin** does not affect the question of the payment of the internal-revenue tax provided for in section 3 of the Foraker act of April 12, 1900 (31 Stat., 77). 55.
5. **Stamp Tax on Bills of Lading.**—Under the war-revenue act of June 13, 1898 (30 Stat., 459), a 1-cent stamp should be attached to all bills of lading for goods transported from places within the United States to Canada or Mexico. Such bills being in part domestic, given for transportation within the United States as well as for export, may be taxed upon the domestic part regardless of the ultimate destination of the goods. 44.

**JURISDICTION.**

1. **Civil and Military Courts in Philippine Islands.**—An officer in the Army of the United States who, while operating in the Philippines during the insurrection in those islands, and while the government of military occupation was in force therein, committed an offense against a native of those islands, was amenable only to the laws of war and can not be tried by the civil courts of those islands or of the United States; and, having left the military service, he can not now be tried for the offense by a military court. 570.
2. **Same.**—A court-martial has no jurisdiction over an officer after he has left the service, and a military commission has no jurisdiction to try such officer now that peace has been proclaimed in the Philippines.
3. **Of State Harbor Commissioners, Norfolk Harbor.**—The State of Virginia, through its legislature, having duly relinquished jurisdiction over the lands belonging to the United States at the navy-yard at Norfolk upon which it is proposed to construct a dry dock, the State board of harbor commissioners for the port of Norfolk and Portsmouth is without authority to require the submission to and approval by it of the plans of the contemplated improvement, although such improvement be within the harbor line established by that board. The authority of the United States over that harbor is paramount and absolute. 50.
4. **Release of Cruiser Galveston from Possession of State Court.**—The Attorney-General defers answering the question as to the right of the Secretary of the Navy, under the direction of the President, to employ the military forces of the Government to obtain possession of the cruiser *Galveston*, in course of construction under contract with the Wm. R. Trigg Company, of Richmond, Va., which company has gone into the hands of a receiver appointed by the chancery court of Virginia, for the reason that a method of procedure in such cases is provided for by section 3753, Revised Statutes, and occasion for the exercise of this power is not likely to arise if the stipulation authorized by that section is filed. 679.
5. **Same.**—No instrumentality of the Government may be taken into custody and held under any adverse authority whatever. This applies as well to an instrumentality in process of creation as to one already completed. *Ib.*
6. **Same.**—The United States is entitled to the undisputed possession and control of its property and of property in which it is interested to the extent of that interest, and this possession and control are exempt from the process of every court. *Ib.*
7. **Same.**—The word "stipulation," as used in section 3753, Revised Statutes, denotes an undertaking in the nature of bail, and is analogous to the "stipulation for value" under present admiralty

**JURISDICTION—Continued.**

practice, the measure of the Government's obligation being limited in section 3754, Revised Statutes, to "the value of the interest of the United States in the property in question." *Ib.*

8. *Same.*—The discretion of courts relative to such "stipulation" is practically limited to a consideration of the bond or equivalent engagement and the sufficiency of the sureties where security is required, the release of the property following as matter of right. *Ib.*

**LABELING OR BRANDING DAIRY AND FOOD PRODUCTS.**

*See FALSE LABELING OF DAIRY OR FOOD PRODUCTS.*

**LEAD BULLION.** *See CUSTOMS LAWS, 23, 24.***LEGACY TAXES.**

1. *Refunding of Legacy Taxes.*—There is no distinction in the meaning of the terms "vested" in the first paragraph, and "vested in possession or enjoyment," in the second paragraph of section 3 of the act of June 27, 1902 (32 Stat., 406), which provides for the refunding of taxes paid upon legacies and bequests for religious uses, etc., under the act of June 13, 1898 (30 Stat., 464). 98.
2. *Same.*—"Vested"—"Vested in Possession or Enjoyment."—The two expressions should be given their technical legal significance in each paragraph. The words "vested in possession or enjoyment" do not imply an actual physical possession, but mean merely that the contingency had been removed prior to July 1, 1902. *Ib.*

**LETTERS ROGATORY.**

1. *Execution of German Letters Rogatory by United States Courts.*—The Attorney-General can not properly pass upon the question whether the courts in this country have authority to execute letters rogatory issued out of the German patent office, as that is a matter for judicial and not for executive determination. 69.
2. *Same.*—Congressional legislation recommended which shall explicitly authorize the issuing of letters rogatory by the Patent Office of the United States, and shall clothe the Federal courts with power to execute letters issued by those patent offices of the recognized powers which possess and exercise well-defined judicial functions. *Ib.*

**LICENSED OFFICERS OF STEAM VESSELS.**

1. *Compulsory Testimony.*—A licensed officer of a steam vessel, duly summoned to give testimony in a hearing before a board of United States local inspectors of steam vessels, who refuses to answer questions which are, in the opinion of the board, material and proper, may be compelled to answer, under the penalty of suspension or revocation of his license or otherwise. 136.
2. *Same.*—*Contempt.*—A refusal on the part of a witness to answer a proper question pertinent to the issue before a court is a contempt, and while this power may not be absolute in this special

**LICENSED OFFICERS OF STEAM VESSELS—Continued.**

tribunal, which is not given the right to impose fines or imprisonment for disobedience to its authority, nevertheless the principle may be invoked so far as the special service and special discipline go. *Ib.*

3. **Same—May not Refuse to Answer on the Ground that it May Subject Him to a Penalty.**—Such licensed officer when charged with a violation of section 4449, Revised Statutes, and on trial before the above-named board on such charge, has no right to refuse to answer a question material to the inquiry upon the ground that his answer may subject him to the penalty provided in that section. *Ib.*
4. **Same.—Section 4449, Revised Statutes, is a remedial, not a penal, statute,** and the revocation of a license as therein provided may be viewed rather as a remedy to insure better efficiency in the Steamboat-Inspection Service than as a punishment for an offense committed. *Ib.*
5. **Same—May not withhold Information and Remain in the Service.**—Such licensed officers are engaged in a special service, peculiarly related to the Government; they are endowed with certain privileges and subject to certain burdens, and paramount considerations of the good of the service require that such an officer shall not be permitted to withhold any information material to an inquiry affecting the service and yet remain a member of that service. 137.

**LIQUIDATION OF DUTIES.** See CUSTOMS LAWS, 26.**LOTTERY.**

1. **Gift Enterprise—Scheme of Chance.**—The contracts issued by the Home Cooperative Company of Kansas City, Mo., provide for the payment of a membership fee of \$3, and succeeding monthly payments of \$1.35, \$1 of which is to be credited to the party paying the same and applied on the installment purchase of a home, the company agreeing that whenever the sum of \$50 shall have accumulated from these monthly payments, and from such payments on each like contract subsequently issued, the contract having the lowest number not then matured shall be deemed to have matured, and the owner thereof shall be entitled to an installment of \$50 per month to be applied on the payment of a home for such owner, until \$1,000 has been paid, when the contract shall be deemed to be fully performed. After the maturity of a contract, the monthly payments are increased to \$5.35, \$5 of which is to be placed to the credit of the party purchasing the home; and when the amounts so paid aggregate \$1,000, less the amount such owner has to his credit at the maturity thereof, then the lien of the company on the property is discharged and the title thereto vests in the owner of the contract. Each contract is to be numbered in the order of its acceptance and given the number next higher than the



**LOTTERY—Continued.**

contract last made, the benefits of each contract beginning in numerical order after the fulfillment of the contracts of lower number. *Held*, That the plan is a "gift enterprise or scheme for the distribution of money by chance," within the meaning of section 3894, Revised Statutes, as amended September 19, 1890 (28 Stat., 465), and, as such, the Postmaster-General is authorized, under sections 3929 and 4041, Revised Statutes, to exclude from the mails all mail matter connected with such business. 563.

2. *Same*.—As the number given a contract when issued, and not the date of receipt, determines its value, a contract bearing a low number will be much more valuable than one bearing a high number; and it being largely a matter of chance which contract will receive the lowest number, and consequently be of greater value, the elements of a lottery are clearly discernible in the scheme. *Ib*.

**LOUISIANA.**

1. *Reservations in State Cessions of Lands to the United States*.—The act of Louisiana, approved June 30, 1892, ceding jurisdiction to the United States over certain lands in that State for public purposes, and providing for the purchase and condemnation thereof, satisfies the requirements of section 355, R. S., and no further cession of jurisdiction is legally required. 617.
2. *Same*.—The settled construction of the Department of Justice is that the "consent" of the legislature of a State to the purchase of lands therein by the United States, required by section 355, R. S., must be free from any conditions or reservations inconsistent with the exercise by Congress of "exclusive legislation" thereover; but the reservation by a State of the right to serve and execute its civil and criminal process in the place ceded has always been held permissible. *Ib*.

**LOYAL CREEK CLAIMS.**

1. *Attorneys' Fees*.—The attorneys for the Creek Indians in the so-called "Loyal Creek Claims" are not entitled to the fees mentioned in the Indian appropriation act of March 3, 1903 (32 Stat., 994), until the amount therein appropriated, \$600,000, has been accepted by the Creek Nation in full payment of these claims. 623.
2. *Same*.—This appropriation is in the nature of a compromise of all the Loyal Creek claims, the payment of the \$600,000 being conditioned upon its acceptance by said Indians; and if not accepted, there will be no fund available from which to pay said attorneys. *Ib*.

**MACHEN BROTHERS, COAL CONTRACT.** See POST-OFFICE DEPARTMENT.**MAIL.** See PHILIPPINE ISLANDS, 1-4.

**MAIL CONTRACT.**

**Sub-letting of.**—Where a person who has contracted with the Government to carry the mails over several routes enters into an agreement with a third person, without the consent of the Postmaster-General, to perform the whole service he has contracted to perform with regard to one of the routes, and is to receive the whole compensation allowed therefor, such agreement is a sub-contract within the meaning of the act of May 17, 1878 (20 Stat., 62), and the regulations of the Post-Office Department thereunder. 541.

**MANIFEST.** *See* VESSELS.

**MARINE CORPS OF THE UNITED STATES.**

1. **Promotion—Relative Rank.**—The mere promotion of two officers in different departments of the Marine Corps does not, under sections 1603 and 1219, Revised Statutes, disturb their preexisting relative rank. 74.
2. **Same.**—Section 1219, Revised Statutes, does not purport to regulate merely the relative rank of officers in the same department of the Army, but is intended to fix the relative rank of the various officers of different departments of the Army. *Ib.*
3. **Same.**—There is no warrant, therefore, for holding that promotions are appointments where the officers promoted are in different departments of the Marine Corps, but are not appointments where they are in the same department. *Ib.*
4. **Rank and Pay of Retired Officers of.**—Section 11 of the act of March 3, 1899 (30 Stat., 1007), which fixes the rank and pay of retired officers of the Navy, does not apply to officers of the Marine Corps. 709.
5. **Certificate of Merit.**—Section 1216, Revised Statutes, as amended (act of March 29, 1892; 27 Stat., 12), which empowers the President to grant a certificate of merit to an enlisted man of the Army who has distinguished himself in the service and has been recommended therefor by the commanding officer of the regiment or the chief of the corps to which such man belongs, applies only to enlisted men of the Army, and not to members of the U. S. Marine Corps who have been similarly commended. 579.

**MARINE-HOSPITAL SERVICE.** *See* Porto Rico, 9.

**MASTERS OF FOREIGN VESSELS.**

1. **Right to Shackle Alien Passenger in Port of United States.**—The Master of a foreign vessel has a right, under the laws of the United States, to put in irons an alien on board his ship who is not allowed by law to enter the United States, in order to prevent such person from unlawfully landing; but this may be done only in exceptional cases and where nothing less will prevent the landing of such person. 531.

**MASTERS OF FOREIGN VESSELS—Continued.**

2. *Same.*—By the comity of nations, masters are permitted to exercise the same power, practically, in port as at sea, so far as matters within their vessels, and not disturbing the peace of the port, are concerned. *Ib.*
3. *Same.*—Whether such officer should put irons upon an alien immigrant is a question of *care* and good faith. He must, in good faith, be careful to prevent the landing; but when he has exercised reasonable care to that end, he neither must nor may do more. *Ib.*
4. *Same.*—What is *care* or *negligence* is a question which varies with the particular cases; it does not depend upon the master's discretion, but may be brought by the alien to the determination of the courts. *Ib.*

**MEDAL OF HONOR.**

1. **Military Service.**—Under section 6 of the act of March 3, 1863 (12 Stat., 751), the President may present a medal of honor to an officer or private in the military service of the United States who has distinguished himself in action, notwithstanding he is not in the military service at the time the case reaches the President for consideration, provided the application or recommendation therefor was made while he was in the military service. 580.
2. *Same.*—A medal of honor can not be awarded where the application or recommendation therefor is made after the officer or private has been discharged from the military service. *Ib.*

**MILITARY SERVICE OF THE UNITED STATES.**

1. **Induction of State Militia Into.**—Certain members of the Sixth Massachusetts Militia which was called into the service of the United States by proclamation of the President of April 15, 1861, who failed to reach Washington, the place of rendezvous, were never inducted into the actual military service of the United States under that call, a formal muster-in being necessary. 651.
2. *Same—Constructive Service.*—The question as to whether a constructive muster-in of militia might not have in some instances the same effect as a formal muster-in of militia under a call by the President, not considered. *Ib.*

**MILITARY SUPPLIES.**

**Arms—China.**—The mere shipment or exportation of arms, in the way of commerce, to a country in which there are insurrectionary movements, does not seem to be prohibited by the statutes of the United States or by the law of nations. 25.

*See also* NEUTRALITY.

**MISSISSIPPI CHOCTAW INDIANS.** *See* INDIANS.**MISTAKE OF FACT.** *See* CUSTOMS LAWS, 27–29.**NATIONAL BUREAU OF STANDARDS.**

1. **Services to State Institutions.**—Under section 8 of the act of March 3, 1901 (31 Stat., 1449), each State may properly demand and

**NATIONAL BUREAU OF STANDARDS—Continued.**

receive from the National Bureau of Standards all comparisons, calibrations, tests, or investigations, free of charge, which are necessary or essential for a State government in performing its lawful functions. 667.

2. *Same.*—State institutions may also call upon and receive from that Bureau, free of charge, such services, specified in section 8 of the above-named act, as State governments would be entitled to have performed. *Ib.*
3. *Same.*—The Secretary of the Treasury is authorized, under sections 3 and 9 of said act, to provide by regulation what officer or officers of "State governments" shall be recognized by the Bureau in requests made upon it for the services specified in that act. *Ib.*

**NAVAL OFFICERS.**

1. *Relative Rank.*—The granting of a pardon to a naval officer for the purpose of restoring him to his original position on the Navy list, under the belief that a nomination intended to accomplish that end had failed because it had not been directly confirmed by the Senate, but which, in reality, had been confirmed by the advancement of another officer nominated at the same time, did not operate to advance such officer beyond the relative position he originally held on the list. 606.
2. *Same.*—The effect of a pardon is to put an end to the infliction of further punishment. In the present instance it merely operated to end any doubt there might be as to the legality of the restoration of such officer to his original position. *Ib.*

**NEUTRALITY.**

1. *Military Supplies—Horses.*—A general statement of the law to be applied in the matter of the shipment of horses from New Orleans to South Africa, for military purposes, and the alleged establishment of foreign agencies in the United States for the purchase and shipment of hostile supplies (horses and mules) for use against a third party. 15.
2. *Same—Contraband.*—According to the weight of authority, the sale of contraband or war supplies to a belligerent is not unlawful, or a thing which a neutral nation must forbid to its citizens. *Ib.*
3. *Same—Commerce.*—A neutral nation must not give aid to one of the belligerents in the carrying on of war; but the carrying on of commerce with the belligerent nations in the manner usual before the war is not in itself the giving of such aid. *Ib.*
4. *Same—Commerce.*—The mere increased demand for warlike articles, and their consequent increased quantity in the commerce between the neutral and the belligerent countries, does not of itself make the commerce cease to be the same that was usual before the war. *Ib.*

**NEUTRALITY—Continued.**

5. **Same.**—A belligerent may seize merchandise at sea involved in such commerce when it is the property of his enemy, or when it is composed of articles for direct and immediate use for war-like purposes. *Ib.*
6. **Same—Due Diligence.**—The fact that neutral individuals, instead of their government, give aid to the belligerent, does not relieve the neutral government from guilt; but the government is innocent if the acts of individuals are such as, from their nature, make it impracticable or excessively burdensome for the government to watch and prevent, or, if preventable without excessive burden, the government uses due diligence about their prevention. *Ib.*
7. **Same—Obligation of the Government.**—The fact that neutral merchants give aid to belligerents purely from motives of gain seeking does not relieve their government from its obligation to prevent such aid being given. *Ib.*
8. **Same—Points by which to be Guided.**—In determining whether a series of transactions which, in one aspect are commercial in character, are prohibited to the neutral nation and its people as being an aid to one of the belligerents in carrying on war against the other, the criteria are practically impossible to specify in advance. Among the points by which to be guided in determining that question are the systematic character of the transactions, their greater or less extensiveness, their persistence in time, their governmental character or the absence of it, their objects and results, and, principally, their relation, if any, to the prosecution of the war being carried on by the belligerent. *Ib.*

**NORFOLK, VA., DRY DOCK.** See VIRGINIA STATE BOARD OF HARBOR COMMISSIONERS.**OFFICE.**

1. **General Appraiser—Incompatible Service.**—The provision in section 12 of the customs administrative act of June 10, 1890 (26 Stat., 136), directing that a general appraiser "shall not be engaged in any other business, avocation, or employment," is not applicable to the case of a general appraiser detailed by the Secretary of the Treasury, without additional compensation, as "an expert to represent the United States in the international commission for the conversion of the present Chinese tariff into specific rates." That provision, in connection with other provisions of the law, means that such officer can not hold another office under the Government or be engaged in other incompatible Government service. 12.
2. **Same.**—There is no incompatibility between the office of general appraiser and the special service of expert for which such officer was detailed, the latter service being a mere employment without compensation, and not an office. *Ib.*

**OPINIONS.** See ATTORNEY-GENERAL.

**PANAMA CANAL TITLE.**

The contract of concession of March 20, 1878, between the United States of Colombia and the International Inter-oceanic Canal Association (Exhibit C, p. 337), granted to that company the exclusive privilege of constructing a maritime canal across the territory of that Republic between the Atlantic and the Pacific oceans and of operating the same for a period of ninety-nine years from its completion; also the right to construct a railroad along and as an auxiliary to the canal. Public lands necessary for the excavation of the canal and for the construction of the railroad were granted; but all lands, together with the canal, and the railroad, if constructed, were to return to the Republic of Colombia at the expiration of the concessionary period. The contract of concession was, by its terms, transferable, but could not be ceded or mortgaged in any way to a foreign nation or government.

This concession was transferred by the *cessionnaire* on July 5, 1879, to "The Universal Company of the Inter-oceanic Canal of Panama," hereinafter referred to as the "Old Panama Canal Company," which company began to work on the canal and continued it until 1888, when, becoming involved in financial difficulties, it was, by a judgment of the civil tribunal of the Department of the Seine, on February 4, 1889 (Exhibit H, p. 375), placed in charge of a *liquidator*, who was authorized, among other things, to contribute or turn over the assets to a contemplated new company, hereinafter referred to as "The New Panama Canal Company."

On December 28, 1890, a law of Colombia (Exhibit C, p. 346) granted to the *liquidator* of the Old Panama Canal Company a prorogation or extension of ten years in which to complete the canal. In 1892 a law of that Republic authorized the executive authority to extend the time for organizing the proposed new company and recommencing the work, which new contract should not require the approval of the Congress of that country. The executive authority thereupon extended the time for constituting the new company until October 31, 1894, and declared that the term of ten years mentioned in the prorogation of 1890 should begin on the organization of the New Company. The New Canal Company was definitely constituted October 20, 1894 (Exhibit J, p. 393), and the ten years accordingly ends October 20, 1904. On April 26, 1900, the executive power of Colombia granted or undertook to grant the New Canal Company a further extension of six years from October 31, 1904 (Exhibit C, p. 352).

Upon the formation of the New Company in 1894 the *liquidator* entered into a contract with its founders whereby all the rights, franchises, and property of the Old Company, including

**PANAMA CANAL TITLE**—Continued.

the stock owned by it in the Panama Railroad Company, a New York corporation, were transferred to the New Company. It was therein stipulated that the Old Company should receive 60 per cent of the net profits of the enterprise, subject to a reduction to 50 per cent in case the construction of the canal should not be attempted, or prove impossible of execution, in which event the New Company was to acquire the unconditional title to the railroad shares upon the payment of 20,000,000 francs, in the manner set out in the agreement.

On June 8, 1888, a special law of France authorized the Old Company to raise funds by means of lottery bonds (Exhibit F, p. 372), and, after its dissolution, a subsequent law authorized the *liquidator* to issue some of the same bonds. The bonds in his hands unissued were not among the rights contributed by him to the New Company.

Under the special law of France of July 1, 1893, which was passed to regulate the liquidation of the Old Company, all the acts of the *liquidator* tending to alienate the assets of the company were required to be approved by the civil tribunal of the Seine.

On January 9, 1902, the officers of the Old Company, having been duly authorized by the "general meeting" of its stockholders, offered to sell to the United States all the property and rights of the company on the Isthmus of Panama and its archives in Paris for \$40,000,000 (Exhibit T, p. 501). By formal proceedings in the civil tribunal of the Seine the *liquidator* and the *mandataire* of the bondholders of the Old Company (whose appointment had been provided for in the special law of July 1, 1893) announced their consent to such sale; and by the judgment of March 19, 1902, that tribunal approved such consent of the *liquidator* (Exhibit 4, p. 231). A division of the \$40,000,000 between the New Company and the *liquidator* of the Old Company was settled by arbitration, the submission of the matter to arbitration being authorized by a judgment of the civil tribunal of the Seine on August 2, 1901 (Exhibit O, p. 463).

One of the bondholders of the Old Company, M. Donnadiou, requested the civil tribunal of the Seine to annul its own judgment approving the action of the *liquidator*, but that tribunal, by judgment of July 3, 1902 (Exhibit 5, p. 234), decided that Donnadiou had no right of action, because, under the special law of 1893, he was represented by the *mandataire*, and that he had no right to question the power of the New Company to sell, having no legal relations with that company. That judgment was confirmed by the court of appeals of Paris on August 5, 1902 (Exhibit 6, p. 251), for the same reason; and that judgment has now become final, the time allowed for an appeal to the court of *cassation* having expired.

**PANAMA CANAL TITLE**—Continued.

*Held*, That the United States would receive a good, valid, and unencumbered title to the property and rights in and to the Panama Canal, provided the Colombian Government consents to such transfer. 144.

The essential nature of each of the two companies, the New Panama Canal Company and the Old Panama Canal Company, is that of a voluntary partnership, their powers being similar to those of an individual Frenchman—an individual merchant corresponding to the New Company and an individual who is not a merchant to the Old Company. *These companies have, therefore, the same power to sell their property that an individual Frenchman would have*, subject to the right of third parties to oppose the sale because of claims against the property for debts, etc. *Ib.*

The law of July 24, 1867, and the amendment of August 1, 1893 (Exhibit 3, p. 221), which impose a few restrictive rules for the greater security of the partners and of third parties, do not change the essential character of these companies as partnerships, do not establish any tie to the Government, and do not forbid the exercise of the right to dispose of their property; nor is there any special law of France which deprives either company of this right. *Ib.*

History and nature of these companies and of the authority of the "general meeting" considered at length, pages 155-163. *Ib.*

The "*general meeting*" of stockholders of the New Company has the power, under articles 60 and 63 of the by-laws (Exhibit I, pp. 389, 390) *to offer for sale and to ratify the sale of the property in question.* *Ib.*

The provisions of the so-called lottery bond law, which required that all machinery for the purpose of accomplishing the work should be made in France and that the raw materials should be of French origin, will not be binding on the United States. *Ib.*

*The liquidator has power*, under the general law of France and the special act of July 1, 1893, and under the judgments of the civil tribunal of the Seine of March 19, 1902, and of the court of appeals of Paris of August 5, 1902, *to consent to the sale.* The tribunal which originally authorized the sale of all the property or assets of the company has the same power of authorization now. *Ib.*

The powers of the *liquidator* considered at length, pages 164-170. *Ib.*

The disposition of the right to the 60 per cent of the net earnings of the New Panama Canal Company for a cash consideration is also clearly within the powers of the *liquidator*. It is an asset of a very ordinary kind and is no more inalienable than the canal itself. *Ib.*



**PANAMA CANAL TITLE**—Continued.

If the title to the railroad company stock is in any sense still in the Old Company, it can clearly be sold by the *liquidator* as an ordinary asset or quitclaimed by him to a purchaser from the New Company. *Ib.*

*The stockholders and creditors of the New Company can not successfully question the power of the company, with the consent of the liquidator and the mandataire of the bondholders of the Old Company, to sell the canal property.* A creditor of the New Company, a solvent concern, able and willing to pay its debts, can no more prevent a sale of the company's property than the creditor of an individual can prevent him, if he is solvent, from selling his personal property or realty. *Ib.*

*The civil tribunal of the Seine had the power under the special law of July 1, 1893, to authorize the liquidator to ratify the sale of the canal property to the United States, and there appears to be no method known to French law whereby the validity of this law can be attacked.* In France the judicial power is distinct from the legislative, and the courts of that country have no authority to declare that a law regularly passed and proclaimed is ineffective. *Ib.*

The French courts have not undertaken to authorize the action of the New Panama Canal Company, which company needed no such authorization. *Ib.*

*In purchasing this property the United States would incur no obligations to the stockholders, bondholders, or other creditors of either company.* The stockholders would be bound by their own representative, the "general meeting." There are no bondholders of the New Company, but the bondholders of the Panama Railroad Company will have to be considered and perhaps paid from the railroad earnings or otherwise. As for its general creditors, the indebtedness to them is said to be and must be small, and can be ascertained and paid by the company before the sale is consummated or an arrangement made to apply to it a part of the purchase money. *Ib.*

There are no mortgages against the property, and no liens except upon two buildings upon the Isthmus. The judgments are small, amounting to about \$100,000 and interest. These subjects discussed at length, pages 180-188. *Ib.*

There can be no question as to the right of the Government to acquire and hold a large part of the stock of the Panama Railroad Company. *Ib.*

The objection that Congress has authorized a purchase from the New Company only and not from the *liquidator* of the Old Company is unsound. A law must have a reasonable interpretation in view of its object and not be rendered abortive if that can be avoided. The intention of Congress was to authorize the purchase of the canal property from the owner. Whether the title

**PANAMA CANAL TITLE**—Continued.

to the property is in the Old Company or the New is immaterial since both companies join in the proposed sale. The purchase will be from the New Company, and the consent of the *liquidator* of the Old Company will be at most a waiver of rights as to property transferred to the New Company. *Ib.*

**PARDON.** *See* NAVAL OFFICERS, 2.

**PENALTY ENVELOPES.** *See* POSTAL SERVICE OF THE PHILIPPINE ISLANDS, 4.

**PERMANENT CENSUS OFFICE.** *See* CENSUS OFFICE.

**PHILIPPINE ISLANDS.**

1. **The Domestic Postal Service** of the Philippine Islands is under the exclusive control of the Philippine government. 534.
2. **Official Mail Coming from those Islands** through the postal service of the United States should, however, comply with the general laws of the United States regulating the mails under the administration of the Postmaster-General. *Ib.*
3. **Government of—War Department.**—Under the instructions of the President to the Philippine Commission of April 7, 1900, and the Executive order of June 21, 1901, the powers and duties thereby conferred upon the Commission and the civil governor were to be exercised under the direction and control of the Secretary of War, and the act of July 1, 1902 (32 Stat., 691), in ratifying and approving the instructions and order referred to, continued this relation. The reasonable inference is, therefore, that until otherwise provided, Congress intended that the government for the Philippine Islands should be regarded as a branch of the War Department. *Ib.*
4. **The Penalty Envelopes Used for the Transmission of Official Mail** from those islands should, accordingly, bear the indorsement of the War Department. *Ib.*
5. **Eminent Domain—Insular Government.**—A good title can be acquired by the United States to land in the Philippine Islands required for use as military posts under either section, 1 or 2, of the act of the Philippine Commission of March 5, 1903 (No. 665), the method provided by section 1 being slightly more circuitous than that provided by section 2, in that it provides for condemnation by the Philippine insular government and subsequent transfer to the United States. 640.
6. **The Philippine Government Derives the Power of eminent domain** from section 63 of the organic act (32 Stat., 706). *Ib.*
7. **Internal-Revenue Tax.—Cigars shipped from the Philippine Islands** to the United States are not subject to internal-revenue tax under section 3402, Revised Statutes. 120.
8. **Same.**—Prior to the passage of the act of July 1, 1902 (32 Stat., 691), the Philippine Islands were "within the exterior boundaries of the United States" within the meaning of section 3448,

**PHILIPPINE ISLANDS**—Continued.

Revised Statutes, and subject to its provisions; but since its passage the provisions of that section have been inoperative in those islands, section 1 of that act providing in effect that the laws of the United States shall *not* apply to the Philippine Islands. No internal-revenue tax therefore can be imposed under the laws of the United States on cigars shipped into this country from the Philippine Islands. *Ib.*

9. **Jurisdiction of Civil and Military Courts.**—An officer in the Army of the United States who, while operating in the Philippines during the insurrection in those islands, and while the government of military occupation was in force therein, committed an offense against a native of those islands, was amenable only to the laws of war, and can not be tried by the civil courts of those islands or of the United States; and, having left the military service, he can not now be tried for the offense by a military court. 570.
10. **Same.**—A court martial has no jurisdiction over an officer after he has left the service, and a military commission has no jurisdiction to try such officer now that peace has been proclaimed in the Philippines.
11. **Confinement of Filipino Convicted in Consular Court in China.**—There is no warrant of law for confining in a Philippine prison a Filipino sailor convicted in the United States consular court at Shanghai, China, of the murder of a Chinaman on the U. S. Army transport *Listrom*, and sentenced to fifteen years' imprisonment. 549.
12. **Same.**—Section 5546, Rev. Stat., as amended by the act of March 3, 1901 (31 Stat., 1451), or without the amendment, contains nothing to indicate that Congress considered the home or domicile of a convict in providing for his confinement, or that in speaking of a "convenient State or Territory" the Philippine Islands were in contemplation. *Ib.*
13. **Manila not a Foreign Port.** 28.

**PHILIPPINE PRISON.** See PHILIPPINE ISLANDS, 11, 12.

**PHILOSOPHICAL APPARATUS.** See CUSTOMS LAWS, 14.

**POLITICAL CONTRIBUTIONS.** See CIVIL SERVICE, 7, 8.

**PORTO RICO.**

1. **Free Importation of Porto Rican Products.**—All articles of Porto Rican origin exported from Porto Rico to foreign countries after the passage of the Foraker Act of April 12, 1900 (31 Stat., 77), may, since the proclamation of the President on July 25, 1901, doing away with the 15 per cent duty imposed under section 3 of that act, be imported into the United States free of duty under paragraph 483 of the tariff act of July 24, 1897 (30 Stat., 195), provided the articles have not been advanced in value or improved in condition by any process of manufacture or other means. 55.

**PORTO RICO—Continued.**

2. **Same—Internal Revenue.**—Such free importation does not, however, affect the question of the payment of the internal-revenue tax provided for in section 3 of the Foraker Act. *Ib.*
3. **Free Importation of Tobacco Grown in Porto Rico.**—Tobacco grown in Porto Rico after the cession of that island to the United States and brought into this country for warehousing, and afterwards exported to Canada and thence returned to the United States, is within the benefits of paragraph 483 of the act of July 24, 1897 (30 Stat., 195), but subject to the internal-revenue tax provisions of section 3 of the act of April 12, 1900 (31 Stat., 77). 612.
4. **Head Tax—Immigration Fund.**—The head tax upon alien passengers brought into ports of Porto Rico should be accounted for and credited to the "immigrant fund," as is done with like collections upon alien passengers arriving at ports in the United States. 86.
5. **Same—Immigration Act.**—Section 14 of the act of April 12, 1900 (31 Stat., 77, 80), "to provide revenues and a civil government for Porto Rico," gives force and effect in that island to the immigration act of August 13, 1882 (22 Stat., 214). *Ib.*
6. **Native Porto Rican, an American Artist—Free Entry of Paintings.**—A native Porto Rican, an artist by profession, although temporarily living in France on the 11th day of April, 1899, is, under section 7 of the act of April 12, 1900 (31 Stat., 79), a citizen of Porto Rico, and, as such, is an American artist, whose paintings upon importation into the United States are entitled to the privileges provided in paragraph 703 of the tariff act of July 24, 1897 (30 Stat., 203). 40.
7. **Public Lands of.**—The so-called "public lands" of Porto Rico which, prior to the treaty of Paris of December 10, 1898 (30 Stat., 1754), belonged to Spain, were, by that treaty, ceded to and now belong to the United States, and not to Porto Rico. 8.
8. **Storage Charges, etc., Collected in Porto Rico.**—Storage charges, fines, penalties, and forfeitures, and other collections, not duties or taxes, made by customs officers in Porto Rico in the administration of the customs laws, should be deposited to the credit of the Treasurer of the United States. 621.
9. **The Tonnage Tax Collected in Porto Rico** under section 14 of the act of June 26, 1884 (23 Stat., 57), as amended by section 11 of the act of June 19, 1886 (24 Stat., 81), should be so deposited as to be available for the maintenance in part of the Marine-Hospital Service. 122.

**POST-OFFICE DEPARTMENT.**

1. **Award of Coal Contract.**—Section 412, Revised Statutes, does not prohibit the Postmaster-General from awarding a contract for furnishing coal for his Department to a firm, it being the lowest

**POST-OFFICE DEPARTMENT—Continued.**

bidder, one of the members of which is an officer of that Department; but if the contract was one for "carrying the mail," it would be clearly within the general prohibition of that section. 557.

2. *Same*—Section 1783, Revised Statutes.—Nor does section 1783, Revised Statutes, prevent the awarding of such contract to the firm referred to if the officer does not "act as an officer or agent of the United States" with reference to the purchase of the coal. That section, being quasi-penal in character, must be strictly construed; and, under such construction, a partner can not be held to be an "agent," for he is a principal, and the act is essentially the act of principals. *Ib.*

3. *Same*—Administrative Discretion.—While there is no statute forbidding the Postmaster-General from awarding the contract to such a firm, he is under no legal obligation to do so. As the question is one of administrative judgment and discretion, the Attorney-General is without authority or obligation to express an opinion with reference to it. *Ib.*

**POSTAL SERVICE OF THE PHILIPPINE ISLANDS.** *See* PHILIPPINE ISLANDS, 1-4.

**PRACTICE, DEPARTMENTAL.** *See* the various Departments.

**PREFERMENT.** *See* CENSUS OFFICE, 2, 4.

**PRESIDENT.**

1. **Appointment of Student Interpreters at Legation to China.**—The President is authorized, under the provisions of the diplomatic and consular appropriation act of March 22, 1902 (32 Stat., 78), to appoint the ten student interpreters at the legation to China therein provided for, without sending their names to the Senate for confirmation. 52.
2. **Certificate of Merit—Military Service.**—The President may grant a certificate of merit to an enlisted man of the Army who has distinguished himself in the service and is recommended for such certificate by the commanding officer of his regiment or by the chief of the corps to which he belongs, notwithstanding the fact that he is not in the military service at the time his case reaches the President for consideration, and, if granted the certificate, will be entitled to additional pay for the period intervening between the date of such service and the date of his discharge from the military service; but the President can not grant a certificate of merit if the recommendation therefor by the commanding officer or chief of his corps was made after the enlisted man was discharged from the military service. 127.
3. **Fees of Consuls—Inspection Cards—Unofficial Services.**—The President may prescribe a fee, as provided by section 1745, Revised Statutes, for the services of a consul in furnishing inspection cards to steerage passengers on vessels destined to the United

**PRESIDENT—Continued.**

States, as required by the quarantine regulations of April 1, 1903, but he has no authority to declare such a fee unofficial and to permit the consul to retain it as such. 672.

4. **Medals of Honor—Military Service.**—Under section 6 of the act of March 3, 1863 (12 Stat., 751), the President may present a medal of honor to an officer or private in the military service of the United States who has distinguished himself in action, notwithstanding he is not in the military service at the time the case reaches the President for consideration, provided the application or recommendation therefor was made while he was in the military service; but a medal of honor can not be awarded where the application or recommendation therefor is made after the officer or private has been discharged from the military service. 580.

5. **Public Lands of Hawaii.**—The President is authorized, under section 91 of the organic act of the Territory of Hawaii (31 Stat., 159), to take such of the public lands of Hawaii as he deems proper for the uses and purposes of the United States. 600.

**PRINCE HENRY OF PRUSSIA, GIFTS FROM.** *See* CONSTITUTIONAL LAW.

**PRISON.** *See* PHILIPPINE PRISON.

**PROMOTION.** *See* ARMY OFFICERS, 4.

**PUBLIC LANDS**

**Of Porto Rico.**—The so-called "public lands" of Porto Rico which, prior to the treaty of Paris of December 10, 1898 (30 Stat., 1754), belonged to Spain, were, by that treaty, ceded to and now belong to the United States, and not to Porto Rico. 8.

**REFUND OF DUTIES.** *See* CUSTOMS LAWS, 27.

**REFUND OF LEGACY TAXES.** *See* LEGACY TAXES.

**REINSTATEMENT.** *See* CIVIL SERVICE, 4-6.

**RELATIVE RANK.** *See* ARMY OFFICERS, 4-6; NAVAL OFFICERS, 1.

**RELEASE OF CRUISER GALVESTON.** *See* JURISDICTION, 4.

**REMISSION OF PENALTIES.** *See* CUSTOMS LAWS, 5, 6.

**RETURN CERTIFICATE.** *See* CHINESE, 9, 11.

**RETURN POSTAGE CLEARING CO.** *See* ATTORNEY-GENERAL—OPINIONS, 1.

**REVOCATION OF LICENSE.** *See* LICENSED OFFICERS OF STEAM VESSELS.

**RIVER AND HARBOR IMPROVEMENT.**

1. **Duty of Secretary of War.**—The words "*is authorized*" contained in that provision of the river and harbor act of June 13, 1902 (32 Stat., 342), which confers upon the Secretary of War the power to purchase or build a dredge for use in harbor improvement and maintenance in Lake Erie, while equivalent to the

**RIVER AND HARBOR IMPROVEMENTS—Continued.**

word "may," are used in a mandatory sense and are binding upon the executive whose duty it is to carry them into effect. 594.

2. *Same.*—While "may" in any statute is ordinarily to be construed as "shall" or "must" when public rights or interests are concerned, yet the construction depends upon the context of the statute, the test being the intent of the legislature. *Ib.*

**SCIENTIFIC APPARATUS.** See CUSTOMS LAWS, 14.**SEARCH WARRANTS.** See UNITED STATES COMMISSIONERS.**SECRETARY OF COMMERCE AND LABOR.** See DEPARTMENT OF COMMERCE AND LABOR.**SECRETARY OF THE TREASURY.**

1. *Acceptance of Federal Building Site in Honolulu.*—The Secretary of the Treasury may, if authorized by the President, accept a site for a Federal building in Honolulu acquired in exchange for public land in Hawaii and assume the custody and control thereof, no objection thereto arising under section 3736, Revised Statutes, or otherwise. 600.
2. *Fines Accepted in Lieu of Forfeiture.*—Where, upon the seizure of smuggled or unentered goods, the Secretary of the Treasury, in the exercise of his power to remit fines and penalties, accepts in lieu of forfeiture the payment of such an amount as he deems just and equitable, the amount paid should be treated as a fine imposed rather than as a duty collected. 583.
3. *Same.*—The power of the Secretary of the Treasury to release and remit fines, penalties, and forfeitures under sections 3081 and 5293, Revised Statutes, and under sections 17 and 18 of the act of June 22, 1874 (18 Stat., 189), now subject to the restriction of section 7 of the customs administrative act as amended (30 Stat., 212), relates only to civil liability and consequences where the value of the property seized or the amount of the fine or forfeiture incurred does not exceed \$1,000; but does not include penalties "accrued" or "incurred" which have been "adjudged" as part of the punishment under an "indictment." *Ib.*
4. *Informer's Compensation.*—Notwithstanding the absence of the certificate provided for by section 6 of the act of June 22, 1874 (18 Stat., 186), the Secretary of the Treasury is authorized, under section 4 of that act, to award compensation to a Canadian customs official who furnished information which resulted in a forfeiture of certain diamonds for violation of section 3082, Revised Statutes. 61.
5. *The Office of Appraiser of Customs in the Collection District of Pittsburgh, Pa.,* having been abolished in 1880 by the Secretary of the Treasury, under the authority conferred upon him by section 2653, Revised Statutes, that officer has no authority to revive it. By abolishing the office the Secretary exhausted all his power in the premises, and Congress alone can re-create it. 613.

**SECRETARY OF THE TREASURY**—Continued.

6. **Power to Release Goods Illegally Imported.**—The Secretary of the Treasury may release cigars imported in violation of section 26 of the act of August 28, 1894 (28 Stat., 552), amending section 2804, Revised Statutes, on payment of a fine equal to the duty, when in his opinion the importation does not involve fraud. 588.
7. **Reference of Matter of Disallowance to Court of Claims.**—Where, upon an appeal to the Comptroller of the Treasury from certain disallowances made by the Auditor for the War Department in the settlement of the accounts of a disbursing officer of the Army, the Comptroller is unable, because of disputed questions of fact, to determine the question presented, and certifies such fact to the Secretary of the Treasury, the latter officer has no authority, under section 1063, Revised Statutes, to direct that the matter be referred to the Court of Claims for trial and adjudication, it not being a claim within the meaning of that section. 545.
8. **Refund of Duties Erroneously Collected.**—The authority of the Secretary of the Treasury to refund duties erroneously collected, on the ground of mistake, is to be restricted to mistake of fact. 34.
9. **Regulations in Regard to Requests upon National Bureau of Standards.**—The Secretary of the Treasury is authorized under sections 3 and 9 of the act of March 3, 1901 (31 Stat., 1449), to provide by regulation what officer or officers of "State governments" shall be recognized by the National Bureau of Standards in requests made upon it for the services specified in that act. 667.

*See also* TREASURY DEPARTMENT.

**SECRETARY OF WAR.**

**River and Harbor Improvement.**—The words "*is authorized*" contained in that provision of the river and harbor act of June 13, 1902 (32 Stat., 342), which confers upon the Secretary of War the power to purchase or build a dredge for use in harbor improvement and maintenance in Lake Erie, while equivalent to the word "*may*," are used in a mandatory sense and are binding upon the executive, whose duty it is to carry them into effect. 594.

*See also* WAR DEPARTMENT.

**SEIZURE AND DESTRUCTION OF FUR-SEAL SKINS.** *See* CUSTOMS LAWS, 32, 33.

**SMUGGLING.** *See* CUSTOMS LAWS, 1-4.

**SPECIAL AGENTS.** *See* CENSUS OFFICE, 5, 6.

**STAMP TAX.** *See* INTERNAL REVENUE, 5.

**STATE BOARD OF HARBOR COMMISSIONERS.** *See* VIRGINIA STATE BOARD OF HARBOR COMMISSIONERS.



**STATE MILITIA.** *See* MILITARY SERVICE OF THE UNITED STATES.**STATE CESSIONS OF LAND TO UNITED STATES.**

1. **Reservations in.**—The act of Louisiana, approved June 30, 1892, ceding jurisdiction to the United States over certain lands in that State for public purposes, and providing for the purchase and condemnation thereof, satisfies the requirements of section 355, Revised Statutes, and no further cession of jurisdiction is legally required. 617.
2. **Same.**—The settled construction of the Department of Justice is that the "consent" of the legislature of a State to the purchase of lands therein by the United States, required by section 355, Revised Statutes, must be free from any conditions or reservations inconsistent with the exercise by Congress of "exclusive legislation" thereover; but the reservation by a State of the right to serve and execute its civil and criminal process in the place ceded has always been held permissible. *Ib.*

**STATUTES INTERPRETED.**

	Page.
Act of March 3, 1863, section 6 (12 Stat., 751). Medal of honor.....	580
Act of July 24, 1866 (14 Stat., 221). Telegraph grants..	603
Act of March 4, 1874 (18 Stat., 19). Authority of chief clerk of War Department to sign requisitions .....	646
Act of June 22, 1874, section 6 (18 Stat., 187). Informer's compensation .....	61
Act of June 22, 1874, sections 17 and 18 (18 Stat., 189). Remission of fines, penalties, and forfeitures.....	583
Act of March 3, 1875, section 1 (18 Stat., 469). Liquidation of duty, refund, mistake of fact.....	34
Act of May 17, 1878, section 3 (20 Stat., 62). Subletting of mail contract.....	543
Act of August 3, 1882, section 1 (22 Stat., 214). Head tax, alien passengers.....	590
Act of January 16, 1883, section 11 (22 Stat., 406). Political contributions .....	133
Act of June 26, 1884, section 14 (23 Stat., 57). Tonnage tax, Porto Rico.....	122
Act of February 26, 1884 (23 Stat., 332). Alien contract labor laws.....	112
Act of June 19, 1886, section 11 (24 Stat., 81). Tonnage tax .....	122, 597
Act of September 13, 1888, section 6 (25 Stat., 477). Debt "unascertained and unsettled".....	637
Act of September 13, 1888, section 7 (25 Stat., 477). Chinese exclusion laws.....	544
Act of March 5, 1890 (26 Stat., 17). Assistant Secretary of War .....	646

**STATUTES INTERPRETED—Continued.**

	Page.
Act of June 10, 1890, section 9 (26 Stat., 135). Duties in case of forfeiture.....	1
section 12 (26 Stat., 136). General appraiser, office, incompatible service.....	12
section 13 (26 Stat., 136). Appraisalment.....	583
Act of September 19, 1890 (26 Stat., 465). Lottery.....	563
Act of February 9, 1891 (26 Stat., 737). Certificate of merit.....	128
Act of March 29, 1892 (27 Stat., 12). Certificate of merit.	128, 579
Act of May 5, 1892 (27 Stat., 25). Certificate of residence, Chinese.....	132
Act of August 18, 1894 (28 Stat., 391). Head tax alien passengers.....	590
Act of January 12, 1895, sections 54 and 73 (28 Stat., 608, 612). American Ephemeris and Nautical Almanac...	663
Act of March 2, 1897, sections 6 and 8 (29 Stat., 606). Tea board of the General Appraisers.....	634
Act of July 24, 1897, paragraphs 181, 182 (30 Stat., 166). Assay, lead bullion.....	45, 569
paragraph 415 (30 Stat., 190). Draw-back.....	6
paragraph 483 (30 Stat., 195). Free importation of Porto Rican products	55, 612
paragraph 701 (30 Stat., 203). Free importation of philosophical or scientific apparatus.....	28
paragraph 703 (30 Stat., 203). Free importation of paintings of American artists.....	40
section 11 (30 Stat., 207). Imported goods, trade-mark.....	551
section 15 (30 Stat., 207). Removal and destruction of merchandise held in bond.....	59
section 30 (30 Stat., 211). Draw-back, camel's hair noils.....	53
section 30 (30 Stat., 211). Draw-back, cotton bales, burlaps.....	575
section 32 (30 Stat., 211). Duties in case of forfeiture.....	1
section 7 (30 Stat., 212). Remission of fines, penalties, and forfeitures.	583
Act of December 29, 1897, section 9 (30 Stat., 226). Destruction of fur-seal skins illegally imported.....	577
Act of June 13, 1898 (30 Stat., 459). Stamp tax on export bills of lading.....	44

**STATUTES INTERPRETED—Continued.**

	Page.
Act of March 3, 1899, section 11 (30 Stat., 1007). Rank and pay of retired naval officers .....	709
Act of April 12, 1900, section 4 (31 Stat., 78). Collection of duties, etc., in Porto Rico.....	621
section 7 (31 Stat., 79). Citizen of Porto Rico, American artist.....	40.
sections 4 and 14 (31 Stat., 78, 80). Tonnage tax, Porto Rico .....	123, 124
section 14 (31 Stat., 80). Head tax, Porto Rico .....	86
Act of April 30, 1900, section 91 (31 Stat., 159). Public lands of Hawaii .....	600
Act of March 3, 1901, section 8 (31 Stat., 1450). National Bureau of Standards .....	667
Act of March 3, 1901 (31 Stat., 1451). Confinement of convict .....	549
Act of March 6, 1902, sections 5 and 7 (32 Stat., 51). Special agents—Census office.....	78
section 5 (32 Stat., 51). Employment of honorably discharged soldiers .....	64
Act of March 22, 1902 (32 Stat., 78). Student interpreters at legation to China.....	52
Act of April 28, 1902, section 3 (32 Stat., 120, 171). Transfer of temporary clerks to classified service.....	81
section 3 (32 Stat., 120, 171). Civil service, Department of State.....	95
section 1797, R. S. (32 Stat., 120, 152). Eviction of trespassers from public lands in District of Columbia ....	616
Act of April 29, 1902 (32 Stat., 176). Chinese-exclusion laws .....	544
section 2 (32 Stat., 176). Enforcement of Chinese-exclusion laws..	561
Joint resolution of May 13, 1902 (32 Stat., 740). American Ephemeris and Nautical Almanac.....	663
Act of June 13, 1902 (32 Stat., 331, 342). River and harbor improvement.....	594
Act of June 27, 1902, section 3 (32 Stat., 406). Refunding of legacy taxes.....	98
Act of July 1, 1902 (32 Stat., 630). Distribution of United States Reports.....	106
Act of July 1, 1902 (32 Stat., 632). Labeling or branding of dairy and food products .....	125, 675, 695
Act of July 1, 1902, paragraph 41 (32 Stat., 641, 651). Mississippi Choctaw Indians.....	689

**STATUTES INTERPRETED—Continued.**

	Page.
Act of July 1, 1902 (32 Stat., 662, 678). American Ephem- eris and Nautical Almanac .....	663
Act of February 14, 1903 (32 Stat., 825). Department of Commerce and Labor .....	697
Act of February 25, 1903 (32 Stat., 854, 896). Census Office .....	699
Act of March 3, 1903 (32 Stat., 982, 994). Attorneys' fees in Loyal Creek claims .....	623
Act of March 3, 1903 (32 Stat., 1031, 1059). Census Office .....	699
Act of March 3, 1903 (32 Stat., 1147, 1158). Dairy and food products .....	675
Act of March 3, 1903, section 36 (32 Stat., 1213). Immi- gration act—dangerous contagious disease .....	706
Revised Statutes, section 355. Reservations in State ces- sions of land to the United States....	617
section 412. Post-Office Department coal contract .....	557
section 1063. Claims against an Exec- utive Department .....	545
sections 1216 and 1285. Certificate of merit .....	128, 129, 579
sections 1219 and 1603. Army officers, relative rank .....	74
section 1745. Fees of consuls.....	672
section 1783. Post-Office Department coal contract .....	558
section 1797. Chief of Engineers, eviction from public lands in District of Columbia .....	616
section 3074. Appraisements .....	583
section 3081. Remission of fines and penalties .....	583
sections 3402 and 3448. Internal-reve- nue tax on cigars from Philippine Islands .....	120
section 3462. United States commis- sioners, search warrants .....	685
sections 3894, 3929, and 4041. Lottery.	563
section 4449. Revocation of license of officer of steam vessel .....	136
section 5293. Remission of fines, penal- ties, and forfeitures .....	583
section 5546. Confinement of convict.	549
Act of the Philippine Commission of March 5, 1903, sec- tions 1 and 2 (No. 665) .....	640

**STATUTORY CONSTRUCTION.**

1. **Implied Authority.**—Where rights of person and property are involved, an implied authority which is summary and might be used arbitrarily should not be lightly assumed. In such cases the inference should not only be persuasive but irresistible. 577.
2. **Repeals by Implication** are never favored. There must be a positive repugnancy between the old and the new law to work an implied repeal. If possible, the two laws should stand together. 561.
3. **What is Expressed in a Statute** is exclusive when it is creative of some right, power, or grant. 621.
4. While "**May**" in any Statute is ordinarily to be construed as "shall" or "must" when public rights or interests are concerned, yet the construction depends upon the context of the statute, the test being the intent of the legislature. 594.

**STEEL SHAFT.** See CUSTOMS LAWS, 13.

**STIPULATION.** See JURISDICTION, 4.

**STUDENT INTERPRETERS AT LEGATION TO CHINA.**

**Appointment of.**—The President is authorized, under the provisions of the diplomatic and consular appropriation act of March 22, 1902 (32 Stat., 78), to appoint the ten student interpreters at the legation to China therein provided for, without sending their names to the Senate for confirmation. 52.

**SOUTH AFRICA.** See NEUTRALITY.

**SUB-LETTING OF MAIL CONTRACT.** See MAIL CONTRACT.

**TEA BOARD OF THE GENERAL APPRAISERS.**

**Hearing before Two Members of.**—A majority of the tea board of the General Appraisers may properly hear and decide questions presented to it, and their decision is valid and binding, even though the third member of the board should not be present at the hearing. 634.

**TELEGRAPH GRANTS.**

1. **Acceptance by an Individual.**—The mere filing by an individual with the Postmaster-General of an acceptance of the restrictions and obligations of the act of July 24, 1866 (14 Stat., 221), entitled "An act to aid in the construction of telegraph lines, etc.," and the acts amendatory thereto, neither confers upon such person the benefits and privileges, nor subjects him to the burdens and restrictions of that act, because he is not a telegraph company organized under the laws of one of the States. 603.
2. **Same.**—The words "any telegraph company organized under the laws of any State," used in the act of 1866, were used advisedly, and with a recognition that they did not include a "person" or an individual. *Ib.*

**TEMPORARY CLERKS, TRANSFER OF.** See CIVIL SERVICE, 3.

**TESTIMONY.** See COMPULSORY TESTIMONY.

**TONNAGE TAX.**

1. **Collected in Porto Rico.**—The tonnage tax collected in Porto Rico under section 14 of the act of June 26, 1884 (23 Stat., 57), as amended by section 11 of the act of June 19, 1886 (24 Stat., 81), should be so deposited as to be available for the maintenance in part of the Marine-Hospital Service. 122.
2. **On Foreign Cable Ship.**—A British cable construction steamship engaged in its legitimate business, arriving at Honolulu from a foreign port, is not a vessel engaged in trade within the meaning of section 11 of the act of June 19, 1886 (24 Stat., 81), and therefore is not subject to the tonnage tax provided for in that section. 597.

**TRADE-MARK.**

1. **Entry of Goods Bearing Foreign Trade-Mark.**—The importation into the United States of an article bearing the genuine trade-mark of the maker, by an importer who is not the owner of the trade-mark, is not forbidden by section 11 of the tariff act of July 24, 1897 (30 Stat., 207), although such trade-mark has been properly registered in the United States and all rights thereunder have been transferred and belong to another party. 551.
2. **Same.**—The purpose of that section is twofold—to protect the domestic manufacturer against encroachment upon his trade-mark and the public from the imposition of imported articles assuming domestic names. It is the simulation or counterfeit, and not reality or genuineness at which the section is aimed. *Ib.*

**TRANS-SHIPMENT OF ALIEN PASSENGERS.** *See* HEAD TAX, 2.**TREASURY DEPARTMENT.**

1. **Collection of Duty on Goods Prohibited from Entry.**—The Treasury Department is not required by the statutes to levy and collect duty or its equivalent on goods, the importation of which is specifically and absolutely prohibited. 556.
2. **Collection of Duties when Forfeiture Prevails.**—There is no authority for the practice of the Treasury Department to exact duties, when forfeiture prevails, only in those cases which arise under section 32 of the tariff act of July 24, 1897 (30 Stat., 211, 212), and not in other customs-revenue cases involving forfeiture. 1.
3. **False Labeling or Branding of Dairy and Food Products.**—The Department of Agriculture and the Treasury Department have no jurisdiction or power under the act of March 3, 1903 (32 Stat., 1157), to prevent or punish the false labeling or branding of dairy or food products after they have passed the customs-house and are delivered to the owner or consignee. 675.
4. **Lead Bullion—Assay.**—While paragraph 181 of the tariff act of July 24, 1897 (30 Stat., 166), which imposes a duty on imported lead ores, contemplates the determination of the quantity of

**TREASURY DEPARTMENT**—Continued.

metal in the ore by assay, by paragraph 182 of that act the determination of the quantity of metal contained in imported lead bullion is to be by official weighing only, and the application of assay to lead bullion under the current Treasury regulations for bonded smelters and refiners is without warrant of law. 45.

5. *Same*—*Drawback*.—The Attorney-General declines to modify the views and conclusion expressed in his opinion of May 15, 1902 (*ante*, p. 45), that paragraph 182 of the tariff act of July 24, 1897 (30 Stat., 166), requires the quantity of metal contained in imported lead bullion to be determined by official weighing only, and that the application of assay to lead bullion under the current Treasury regulations for bonded smelters and refiners is without warrant of law. 569.
6. *Same*.—The statutory percentages of refined metal for exportation may not properly be made up of "such portions of metals as the importer may determine." *Ib.*
7. *Treasury Department Circular No. 52*.—Circular No. 52, Bureau of Immigration, Treasury Department, issued May 10, 1902, providing that duly registered Chinese laborers seeking admission to the United States after temporary absence, under Article II of the treaty of 1894 between the United States and China, must prove that some one of the conditions mentioned in that article exists at the time of application for readmission, is warranted both by the treaty with China and by the existing laws of the United States. 91.

*See also* SECRETARY OF THE TREASURY.

**TREATY.**

Article II of the Treaty with China of December 8, 1894 (28 Stat., 1210)—*Certificate of Disability*.—As heretofore held by this Department (21 Opin., 357; 23 Opin., 545), Article II of the treaty with China of 1894 displaced the provisions of section 7 of the act of 1888 (25 Stat., 476), with regard to the certificate of disability which must be presented by a registered Chinese laborer returning to the United States after an absence of more than one year. 544.

**UNITED STATES.**

1. *Jurisdiction of State Harbor Commissioners*.—U. S. Navy-yard at Norfolk, Va.—The State of Virginia, through its legislature, having duly relinquished jurisdiction over the lands belonging to the United States at the navy-yard at Norfolk, upon which it is proposed to construct a dry dock, the State board of harbor commissioners for the port of Norfolk and Portsmouth is without authority to require the submission to and approval by it of the plans of the contemplated improvement, although such improvement be within the harbor line established by that board. The authority of the United States over that harbor is paramount and absolute. 50.

**UNITED STATES—Continued.**

2. **Release of Cruiser Galveston from Possession of State Court.**—The Attorney-General defers answering the question as to the right of the Secretary of the Navy, under the direction of the President, to employ the military forces of the Government to obtain possession of the cruiser *Galveston*, in course of construction under contract with the Wm. R. Trigg Company, of Richmond, Va., which company has gone into the hands of a receiver appointed by the chancery court of Virginia, for the reason that a method of procedure in such cases is provided for by section 3753, Revised Statutes, and occasion for the exercise of this power is not likely to arise if the stipulation authorized by that section is filed. 679.
3. **Same.**—No instrumentality of the Federal Government may be taken into custody and held under any adverse authority whatever. This applies as well to an instrumentality in process of creation as to one already completed. *Ib.*
4. **Same.**—The United States is entitled to the undisputed possession and control of its property and of property in which it is interested to the extent of that interest, and this possession and control are exempt from the process of every court. *Ib.*
5. **Same.**—The word "stipulation," as used in section 3753, Revised Statutes, denotes an undertaking in the nature of bail, and is analogous to the "stipulation for value" under present admiralty practice, the measure of the Government's obligation being limited in section 3754, Revised Statutes, to "the value of the interest of the United States in the property in question." *Ib.*
6. **Wireless Telegraphy—International Agreement.**—The United States have power, either alone or in cooperation with other countries, to impose conditions upon the operation of any wireless telegraph system which conveys messages to or from the United States. 100.
7. **Same—Regulation of Commerce.**—Such transmission is commerce, and the power of the United States to regulate commerce and to preserve the territorial integrity of this country does not depend upon the means employed, but upon the end attained. *Ib.*

*See also STATE CESSIONS OF LAND TO UNITED STATES.*

**UNITED STATES COMMISSIONERS.**

1. **Compensation—Issue of Search Warrants.**—Although no compensation is provided therefor, it is the duty of United States commissioners to issue search warrants in internal-revenue cases when properly applied for. 685.
2. **Same.**—Section 3462, Revised Statutes, providing for the issue of these warrants, does not state all that must be included in the application therefor. The fifth amendment to the Constitution provides that "no warrant shall issue but upon probable cause



**UNITED STATES COMMISSIONERS—Continued.**

supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." *Ib.*

3. **Same.**—If a United States commissioner refuses, on proper application, to issue a search warrant, the facts may be brought by petition or otherwise to the attention of the court appointing such recusant officer for such action as it deems proper. *Ib.*

**UNITED STATES COURTS.** *See* LETTERS ROGATORY.**UNITED STATES SUPREME COURT REPORTS.**

1. **Distribution.**—Section 1 of the act of July 1, 1902 (32 Stat., 630), entitled "An act for the further distribution of the reports of the Supreme Court, etc.," authorizes the distribution of the *official edition* only of those reports, together with reprints of of such earlier volumes as are out of print or otherwise difficult to procure. 106.
2. **Same.**—A reprint distinguished from a new edition. *Ib.*
3. **Same—Circuit and District Judges.**—Under section 2 of that act the circuit and district judges are authorized to select the editions, whether official or otherwise, for their respective courts, provided that no volumes of the reports have been previously furnished such court. *Ib.*
4. **Same.**—The right of selection is limited to judges of the circuit and district courts, and does not extend to the other distributees mentioned in section 2. It is also limited to the copies to be supplied for the courts, and does not include reports intended for the individual use of the judges. *Ib.*
5. **Same—By whom Furnished.**—The copies to be distributed under section 3 are to be furnished by the publishers of the official reports. *Ib.*
6. **Same—The Digest.**—By section 4 the digests are to be distributed to each judge or other official entitled to receive the decisions, either under the act of July 1, 1902, or prior legislation. *Ib.*

**UNOFFICIAL SERVICE.** *See* CONSULS.**VESSELS.**

**American Vessel from Philippine Islands—Entry—Manifest.**—An American vessel in ballast, arriving in March or April, 1902, at Port Townsend, Wash., from Manila, did not arrive from a foreign port and was not engaged in the coasting trade within the meaning of the laws requiring the making of entry and the sending of a copy of the manifest to the Auditor. 27.

**VIRGINIA STATE BOARD OF HARBOR COMMISSIONERS.**

*See* JURISDICTION, 3.

**WAR DEPARTMENT.**

1. **Authority of Chief Clerk to Sign Requisitions.**—The act of March 4, 1874 (18 Stat., 19), authorizing the Secretary of War, when temporarily absent from the Department because of illness or from other cause, to direct his chief clerk to sign requisitions on

**WAR DEPARTMENT**—Continued.

the Treasury Department, is not superseded by the act of March 5, 1890 (26 Stat., 17), which provides for an Assistant Secretary of War. 646.

2 *Same*.—During the temporary absence from the Department of both the Secretary of War and his assistant, the Secretary is empowered, under the act of 1874, to authorize the chief clerk of the Department to sign requisitions, etc., that act being still in force, at least within the limited scope here stated. *Ib*.

3. **Government for Philippine Islands.**—Under the instructions of the President to the Philippine Commission of April 7, 1900, and the Executive order of June 21, 1901, the powers and duties thereby conferred upon the Commission and the civil governor were to be exercised under the direction and control of the Secretary of War, and the act of July 1, 1902 (32 Stat., 691), in ratifying and approving the instructions and order referred to, continued this relation. The reasonable inference is, therefore, that until otherwise provided, Congress intended that the government for the Philippine Islands should be regarded as a branch of the War Department. 534.

4. *Same*.—**Penalty Envelopes.**—The penalty envelopes used for the transmission of official mail from those islands should, accordingly, bear the indorsement of the War Department. *Ib*.

*See also* SECRETARY OF WAR.

**WAR EMERGENCY EMPLOYEES.** *See* CIVIL SERVICE, 2.

**WAR-REVENUE ACT.** *See* INTERNAL REVENUE, 5.

**WIRELESS TELEGRAPHY.**

1. **International Agreement.**—The United States have power, either alone or in cooperation with other countries, to impose conditions upon the operation of any wireless telegraph system which conveys messages to or from the United States. 100.

2. *Same*.—**Regulation of Commerce.**—Such transmission is commerce, and the power of the United States to regulate commerce and to preserve the territorial integrity of this country does not depend upon the means employed, but upon the end attained. *Ib*.

**WORDS AND PHRASES.**

1. **"All Employees of the Census Office."**—The words "all employees of the Census Office" in section 5 of the above-named act can not be held to apply to special agents or other field employees who may be temporarily assigned to service in the Census Office. 78.

2. **"Any Telegraph Company Organized under the Laws of any State."**—The words "any telegraph company organized under the laws of any State," used in the act of July 24, 1866 (14 Stat., 221), entitled "An act to aid in the construction of telegraph lines," etc., were used advisedly, and with a recognition that they did not include a "person" or an individual. 603.

**WORDS AND PHRASES**—Continued.

3. **"Is Authorized."**—The words "*is authorized*" contained in that provision of the river and harbor act of June 13, 1902 (32 Stat., 342), which confers upon the Secretary of War the power to purchase or build a dredge for use in harbor improvement and maintenance in Lake Erie, while equivalent to the word "may," are used in a mandatory sense and are binding upon the executive whose duty it is to carry them into effect. 594.
4. **"May."**—The word "may" in rule 9 of the Civil Service Regulations vests a discretion in that Commission. The question of reinstatement is one of administrative discretion, and is not to be granted except when consistent with the interests of the public service. 103.
5. **"May."**—While "may" in any statute is ordinarily to be construed as "shall" or "must" when public rights or interests are concerned, yet the construction depends upon the context of the statute, the test being the intent of the legislature. 594.
6. **"Pending settlement"** may mean more than "pending payment;" it may include ascertainment. 637.
7. **"Settlement."**—The word "settlement" in legal use embraces both ideas—the idea of discharging an obligation by payment and the idea of arriving at its amount by ascertainment and adjustment. 637.
8. **"Stipulation."**—The word "stipulation," as used in section 3753, Revised Statutes, denotes an undertaking in the nature of bail, and is analogous to the "stipulation for value" under present admiralty practice, the measure of the Government's obligation being limited in section 3754, Revised Statutes, to "the value of the interest of the United States in the property in question." 679.
9. **"Vested"**—"Vested in Possession or Enjoyment."—There is no distinction in the meaning of the terms "vested" in the first paragraph, and "vested in possession or enjoyment," in the second paragraph of section 3 of the act of June 27, 1902 (32 Stat., 406), which provides for the refunding of taxes paid upon legacies and bequests for religious uses, etc., under the act of June 13, 1898 (30 Stat., 464). 98.
10. **Same.**—The two expressions should be given their technical legal significance in each paragraph. The words "vested in possession or enjoyment" do not imply an actual physical possession, but mean merely that the contingency had been removed prior to July 1, 1902. *Id.*









)





